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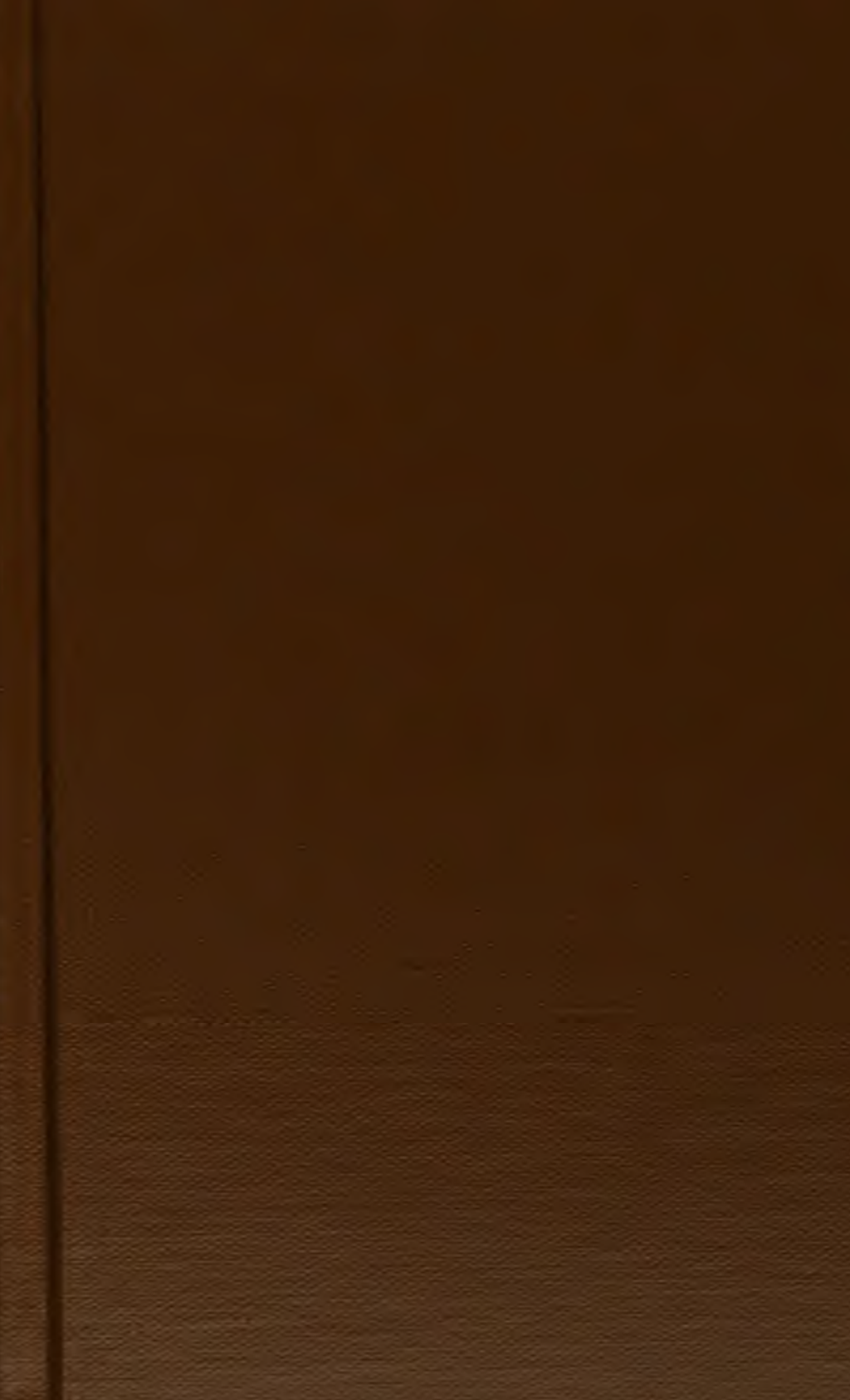
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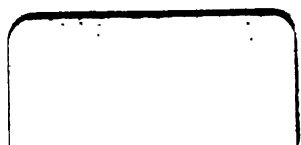
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JUDGES
OF
THE COURT OF QUEEN'S BENCH

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. Lord CAMPBELL, C. J.
Sir JOHN TAYLOR COLERIDGE, Knt.
Sir WILLIAM WIGHTMAN, Knt.
Sir WILLIAM ERLE, Knt.
Sir CHARLES CROMPTON, Knt.

ATTORNEYS GENERAL.

Sir FREDERIC THESIGER, Knt.
Sir ALEXANDER JAMES EDMUND COCKBURN, Knt.

SOLICITORS GENERAL.

Sir FITZROY KELLY, Knt.
RICHARD BETHELL, Esq.



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Wills v. Nurse	- 1 <i>A. & E.</i> 65	- 663
Wilson v. Weller	- 1 <i>Br. & B.</i> 57	- 624
Woods v. Finnis	- 7 <i>Exch.</i> 363	- 365
Wroughton v. Turtle	- 11 <i>M. & W.</i> 561	- 173

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Yates v. Aston	- 4 <i>Q. B.</i> 182	- 174
York and North Midland Railway Company v. The Queen	- 1 <i>E. & B.</i> 858	- 876
Yearbook	- <i>Pasch.</i> 4 <i>H. 6. fol.</i> 19. <i>B. pl.</i> 5-	- 49
—	- { <i>Mich.</i> 20 <i>Hen. 7. fol.</i> 13. <i>B.</i> pl. 24	- 134. 685

ERRATA AND ADDENDA.

Page 66. line 16. and elsewhere throughout the case. The name should be printed *Fudge*.

74. line 3, add note. The judgment in the case in the text was affirmed in the Exchequer Chamber; *Boddington v. Castelli*, post, p. 879.

121. last line but 9, for the comma read "to."

158. note (a) }

160. note (h) } To 14 Q. B. add 587.

162. note (a) }

161. line 1, for "*Regina*" read "*Res.*"

228. line 6, note (a), add The judgment in the case in the text was reversed in the Exchequer Chamber; *York and North Midland Railway Company v. The Queen*, post, p. 858.

253. line 11, note (a), add The judgment in the case in the text was reversed in the Exchequer Chamber; *Lancashire and Yorkshire Railway Company v. The Queen*, post, p. 873. note (d).

261. line 7, add note. The judgment in the case in the text was reversed in the Exchequer Chamber; *Great Western Railway Company v. The Queen*, post, p. 874.

273. line 7, add note. See *Regina v. Newman*, post, p. 558.

363. line 20 } for "*Hilary*" read "*Michaelmas*."

365. line 21 }

421. last line but two, for "*Throustout*" read "*Thrustout*."

463. note (b), for "*B. & Ad. 20*" read "*3 B. & Ad. 20*."

537. line 3, for "defendant" read "plaintiff."

674. line 6, to 14 Q. B. add 759.

692. line 11, for "*PATTESON J.*" read "*CROMPTON J.*"

727. line 5 of marginal note, for "*H's*" read "*E's*."

836. marginal note, last line but three, for "creation" read "execution."

879. in margin, for "*Thursday, May 4th*" read "*Thursday, May 5th*."

882. lines 21, 22, 25, for "*Redmond*" read "*Redman*."

xxviii. Appendix, line 2, for "absolutely" read "absolute."

CASES

1852.

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

MICHAELMAS TERM,

XVI. VICTORIA.

The Judges who usually sat in Banc in this Term were:

LORD CAMPBELL C. J.
COLERIDGE J.

WIGHTMAN J.
ERLE J.

In the matter of ETIENNE BARRONET and
EDMOND ALLAIN.

In the matter of EMANUEL BARTHELEMY and
PHILIPPE EUGÈNE MORNEY.

In the matter of ETIENNE BARRONET and
EDMOND ALLAIN.

*Wednesday,
November 3d.*

MONTAGUE CHAMBERS moved for a writ of habeas corpus to bring up the bodies of *Etienne*

The Court has a discretion to admit accused persons to bail in all cases;

but, in exercising that discretion, the nature of the charge, the evidence by which it is supported, and the sentence which by law may be passed in the event of a conviction, are in general the most important ingredients for the guidance of the Court; and, where these are weighty, the Court will not interfere.

Four foreigners were committed, on the coroner's inquest and by the warrant of justices, to take their trial for wilful murder committed in a duel.

Two of them, when before the committing magistrates, avowed that they acted as seconds

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Case.

to the deceased. An application was made on their behalf to this Court to admit them to bail, on affidavits, by these prisoners, that they had acted only as seconds, that the duel was fair, that they were foreigners ignorant of the law and believing that they were bound as men of honour to act as they did, and that acting as seconds was not punishable in their own country; and they pledged themselves, in the event of being admitted to bail, to abide their trial.

Held that, assuming these facts to be accurate, they afforded no ground for the Court interfering to bail persons proved by their own confession to be guilty of a capital offence.

An application was afterwards made in favour of the two other prisoners, who had not made any such confession. This application was made on an affidavit containing a copy of the depositions before the coroner's inquest, and the committing magistrates, the prisoners making no affidavit. The Court took time to examine the depositions; and, being satisfied that the evidence was sufficient to authorize sending the prisoners to trial, refused to interfere.

Barronet and *Edmond Allain*, and for a certiorari to bring up the depositions on which they were committed, with a view to move this Court to admit them to bail. He moved on affidavits, the effect of which he stated to be that the prisoners were committed on the coroner's inquest, and also by a magistrate's warrant, to take their trial at the *Surrey Assizes* for the wilful murder of *Frederic Courmet*; and that, from the depositions before the coroner and the magistrates, it appeared that *Courmet* was killed in a duel by a person whose name did not appear. That the prisoners, when before the committing magistrates, avowed that they had acted as seconds to the deceased, and maintained that in doing so they had acted as men of honour. *M. Chambers* also moved on affidavits of the prisoners, stating that they were Frenchmen, who had, for political reasons, taken refuge in this country, were ignorant of the law of this country, and believed that acting as seconds in a fair duel was not punishable here, as, according to their affidavits, it was not punishable in *France*; and that this was a fair duel. The prisoners also, as the learned counsel stated, now pledged themselves by their affidavits that, if admitted to bail, they would appear to abide their trial: and it was suggested that, being political refugees, they could not safely fly from this country, even if they wished to do so.

M. Chambers, in support of his application. An application was made during the vacation to *Crompton J.*, to admit

these prisoners to bail. The proper materials were not before the learned Judge; and consequently he did not express any opinion as to the propriety of granting the application. He said however that, if the application were renewed before him, he should not act without having an opportunity of consulting the other Judges. The application is therefore now made to the full Court in the first instance. The depositions bear out the statement of the prisoners that the duel was fair. [Lord Campbell C. J. Do you mean to contend that killing in what is called a fair duel is not wilful murder by the law of *England*?] The ground on which accused persons are detained in prison is not to punish them on account of their guilt, but to secure their abiding their trial; *Regina v. Scaife* (a). Now, though it cannot be disputed that killing in a duel is murder, it never is punished as such; and it is morally certain that the sentence will not be enforced for the first time against two foreigners ignorant of *English* law. There can therefore be no reason to suppose that the prisoners will not face their trial, although the punishment is legally capital. This Court in former times would not have hesitated to admit to bail the late *Duke of York*, or other eminent persons who notoriously fought duels. They were not even committed; and therefore they could not be bailed. The Court can bail, though the charge be murder, and the coroner's jury have returned a verdict against the prisoners. In *Ireland*, very recently, the soldiers concerned in the *Six Miles Bridge* affray, though committed for wilful murder on a coroner's inquisition, were bailed. In 1782, it appears, by the *Annual Register* for that year,

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Case.

(a) 9 Dowl. Pr. C. 553.

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Case.

pp. 212, 213, that Mr. *Allen*, a clergyman, who had killed a man in a duel, was bailed, surrendered, stood his trial, was convicted of manslaughter, and fined one shilling.

Lord CAMPBELL C. J. I am clearly of opinion that no ground has been laid before us on which we should interfere. For obvious reasons, I shall say as little as possible of the circumstances of this particular case: but, after what has been urged in support of the application, I must make some observations. These two gentlemen are foreigners; but, having come to this country, they are in precisely the same position as if they were native subjects; and they must meet with the same measure of justice that would be given to native subjects, even of the highest rank. I feel certain that, if the highest subject had been committed for wilful murder in a duel, and had admitted that he was an accessory before the fact, it would at any time have been in vain for him to have made an application to be bailed. We are, in exercising our discretion, to consider, as is pointed out in *Regina v. Scaife* (a), the seriousness of the charge and the nature of the evidence: but is it to be supposed that this Court will try, by a preliminary inquiry on affidavits, whether a duel was fair or not? To do so might in many cases be most prejudicial to the interests of the prisoner himself. I think we can look only to the nature of the charge, which is in this case a capital offence, and to the evidence, which in this case is a confession. On this evidence, if not altered, the verdict must be Guilty. I hope that the circumstances may prove such that execution of the sentence

(a) 9 *Dowl. Pr. C.* 553.

may be avoided ; but sentence of death must be awarded, on such a verdict. We do not inquire into the circumstances which would be material if we were called upon to act as advisers of the Crown on the question whether the sentence should be mitigated. Such is not our duty at present ; but we are called on to interfere by admitting these prisoners to bail. No instance has been brought before us in which any such step as we are now asked to take has been taken by this Court or by any Judge. The statement in the *Annual Register* of the case of Mr. *Allen* is far too loose to enable us to act upon it. It does not appear clear that he was bailed at all ; or, if he was, it may have been done by a justice of the peace in violation of his duty. The *Irish* case mentioned has no analogy to the present. There the verdict of the coroner's jury, on which the prisoners were charged, was contrary to all the evidence, which shewed clearly that no crime had been committed ; and the prisoners did not confess their guilt, as is done here, but denied it. The prisoners must abide their trial. They will on that trial have every privilege given to foreigners ; but, if, on their trial, they are convicted, sentence of death must be passed upon them, and they must make their application to the mercy of the Crown.

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COLERIDGE J. I also am of opinion that this application must be refused, because I think that, if we granted the writ asked for, and all the facts now suggested appeared unaltered on the prisoners being brought up, we should still be bound to remand them. I am still of the same opinion as that which I expressed in *Regina v. Scaife* (a) : and I adhere to the principles

(a) 9 Dowl. Pr. C. 553.

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Case.

which I then laid down. I do not think that an accused party is detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him, so as to make it proper that he should be tried, and because the detention is necessary to insure his appearance at the trial. This Court has at all times had an unlimited discretion to admit to bail: and, since stat. 5 & 6 W. 4. c. 33. s. 3., two justices of the peace, one of whom shall have signed the warrant of commitment, have power to admit to bail persons charged with felony, "notwithstanding such person or persons shall have confessed the matter laid to his or their charge, or notwithstanding such justices shall not think that such charge is groundless, or shall think that the circumstances are such as to raise a presumption of guilt." That enactment shews clearly that, in the opinion of the Legislature, the guilt of the party charged is not the direct ground on which he is detained in custody; and that the strength of the evidence of guilt, even when it amounts to a confession, is not conclusive as to the propriety of bailing. But it is a very important element in considering whether the party, if admitted to bail, would appear to take his trial: and I think that, in coming to a determination on that point, three elements will generally be found the most important: the charge, the nature of the evidence by which it is supported, and the punishment to which the party would be liable if convicted. In the present case the charge is that of wilful murder; the evidence contains an admission by the prisoners of the truth of the charge; and the punishment of the offence is by law death. Under such circumstances, though this Court has power to interfere, I think it has always been held that in its discretion it will not do so. We are told that these

gentlemen are foreigners who acted in ignorance of the law. I agree with my Lord that foreigners who come to this country must in this respect be put upon precisely the same footing as native subjects. We could not listen to a native who urged that he was ignorant of the law which he had transgressed; nor can we do so to a foreigner. Then we are told that the sentence of death will probably not be executed. I think, however, that we must look to the legal consequences of a conviction, and not speculate on the probable mercy of the Crown.

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Case.

WIGHTMAN J. I think that this Court should not interfere in this case: and, as I entirely concur in the reasons given by my brother *Coleridge*, I shall add nothing to what he has said.

ERLE J. I also think it our duty to refuse this application. I take the principle, on which the Court acts, to be that, where the charge is of a crime of the highest magnitude, the evidence clear, and the punishment the highest known to the law, the Court should not interfere; though, if any one of these ingredients were wanting, it might interfere, if there were special grounds for doing so. With regard to the grounds urged before us on this occasion, I shall only say that I think it of the highest consequence that the administration of justice should be uniform; and we should do great mischief if we introduced into the general rule an exception in favour of foreigners.

Rule refused.

1852.

[Tuesday,
November 23d.]In the matter of EMANUEL BARTHELEMY and
PHILIPPE EUGÈNE MORNEY.[For marginal
note, see ante,
pp. 1, 2.]

HUDDLESTON moved for a writ of habeas corpus, to bring up the bodies of *Emanuel Barthelemy* and *Philippe Eugène Morney*, and for a certiorari to bring up the depositions on which they were committed, for the purpose of moving that they might be admitted to bail. He stated that the prisoners stood committed on the coroner's inquest, and also by the warrant of a justice, to take their trial at the *Surrey Assizes*, for the wilful murder of *Frederic Courmet*. He produced an affidavit containing a copy of the depositions, but no affidavit by either of the prisoners.

Huddleston, in support of his application. The two prisoners in the present case have made no admission of their guilt; such an admission was made in *Barronet's Case* (a), and seems to have materially influenced the decision of the Court there. And the presence or absence of a confession has always been considered a very important point; 4 *Inst.* 178. Much weight also was attached, in *Barronet's Case* (a), to the supposed absence of precedents. But precedents have been found. In 1843, when Colonel *Fawcett* was killed in a duel, Mr. *Gulliver*, who seems to have been the surgeon attending on the ground, was committed for trial on the coroner's inquest. He was admitted to bail by *Coleridge J.*; he surrendered, stood his trial and was acquitted. In *The Earl of Cardigan's Case*, where the

(a) Ante, p. 1.

duel proved not fatal, his Lordship and his second (a commoner) were arrested on the spot. Lord *Cardigan*, when brought before the magistrates, said: "I have fought a duel and have hit my man." He was bailed by the justices. Afterwards an indictment was found against him and his second for shooting with intent to kill. *Bosanquet J.*, after this, enlarged the recognizances both of Lord *Cardigan* and of his second. These are modern cases which are not reported in any legal work, but which may be cited as matter of history. In *Rex v. Morgan (a)* there was an indictment for murder, which, as appears from the arguments at p. 86 of the report, was committed in a duel. There was also an appeal for the same murder; *Egerton v. Morgan (b)*; which abated. There was an application to bail the prisoner, after the indictment had been found; and many authorities were cited on the subject, which are collected at p. 85 of the report; the prisoner was bailed, afterwards surrendered, took his trial, was convicted and pardoned. [Lord *Campbell C. J.* I do not think it has ever been doubted that the Court *may* bail in a case of murder. In *Rex v. Morgan (a)* the Court seem to have proceeded on the ground that there was improper delay on the part of the prosecutor. Your present application is apparently on other grounds. What are the facts on which the committal took place here?] It is very inconvenient, and may be very mischievous to the prisoners, to discuss the nature of the evidence. Lord *Mansfield* disapproved of that course in *Rex v. Lord Baltimore (c)*. [Lord *Campbell C. J.* A prisoner cannot be admitted to bail unless he makes out that there are not sufficient grounds

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BARTHELEMY'S
Case.(a) 1 *Bulst.* 84.(b) 1 *Bulst.* 69.(c) 1 *W. Bl.* 648.

1852. for keeping him in custody. *Coleridge J.* The uniform
BARTHELEMY'S practice is to produce, on the application for the cer-
Case. tiorari, copies of the depositions, verified by affidavit,
and argue upon those.]

Huddleston then referred to the copy of the depositions both before the magistrates and before the coroner, and argued that the evidence against the prisoners was slight, and that consequently they were likely to appear and take their trial. [*Lord Campbell C. J.* We will look over the depositions.]

Cur. adv. vult.

Lord CAMPBELL C. J., on the next day (*November 24th*), delivered the judgment of the Court.

We have carefully looked over the depositions in this case; and we are of opinion that we should not be justified in interfering. It appears that the prisoners are committed on an inquisition, good on the face of it, finding them guilty of wilful murder: and, on looking at the depositions, it appears clear that there was a murder committed in a duel; and we think that there is evidence that the prisoners were parties to the murder. We give no opinion as to whether that evidence is conclusive; but we think that it is sufficient to authorize the sending them to trial. It is unnecessary to consider what course we should pursue if the evidence were insufficient; for we are of opinion that it is sufficient: and we could not bail these prisoners without making a distinction between murder committed in a duel and any other murder, which would be contrary to all principle. Time was when the public feeling on this subject was contrary to the law. I am happy to think it is now in accordance with the law; and I hope that the time

is fast approaching when the custom of duelling will not only be, as it always was, wicked and illegal, but also be considered absurd.

1852.

BARTHELEMY'S
Case.

Rule refused.

COBBETT *against* HUDSON.Wednesday,
November 3d.

ACTION on the case; in which issues in fact were joined. On the trial, before Lord *Campbell* C. J., at the *London* Sittings after *Easter* term, the plaintiff, who sued in formâ pauperis, conducted his cause in person. The Lord Chief Justice told him that, if he addressed the jury as an advocate, he could not be permitted to give evidence as a witness. The plaintiff elected to act as advocate, and not as witness. Verdict for defendant.

A party to a suit, conducting his own cause at the trial, has a right to address the jury as an advocate, without waiving his right to give evidence as a witness in his own behalf.

In *Trinity* term, the plaintiff in person obtained a rule nisi for a new trial, on the ground of the Lord Chief Justice's ruling above stated.

Watson and *Unthank* now shewed cause (a); and *The Plaintiff* in person was heard in support of the rule. The nature of the arguments appears from the judgment.

Cur. adv. vult.

Lord CAMPBELL C. J., on a subsequent day in this term (*November* 20), delivered the judgment of the Court.

We are of opinion that in this case the rule for a new trial should be made absolute, on the ground that

(a) Before Lord Campbell C. J., Coleridge, Wightman and Erle Jjs.

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COBBETT
v.
HUDSON.

the plaintiff was improperly told that he could not be permitted to address the jury as his own advocate without agreeing to waive his right to be examined as a witness in his own behalf. We are fully aware of the inconvenient consequences which must follow from a party to a suit being alternately during the trial advocate and witness; and we express our strong disapprobation of such a practice. But we cannot say that the Judge at *Nisi prius* has at present sufficient authority to prevent it. Before the recent statute (14 & 15 *Vict. c. 99.*) the party had a right to conduct his own cause in person, although he could not be his own witness: and by that statute (sect. 2) he is rendered "competent and compellable to give evidence" as a witness, without any abridgment of his former right to act as his own advocate. We must be careful that we do not abridge the rights conferred on suitors by common or statute law, while we are acting merely on views of policy and expediency, with respect to which different Judges may form different opinions. It was stated, at the trial, that verdicts had several times been set aside on the sole ground that the same person had been permitted to act as advocate and to be examined as a witness: but, when the cases alluded to are examined, it will be found that the rigid rule contended for was not laid down in them. In *Stones v. Byron* (a), upon a trial before the sheriff, an attorney having addressed the jury as advocate for the plaintiff and then been examined as a witness for him, *Patteson J.* observed: "I must say that I do not think that such a course of proceeding is proper, or consistent with the due administration of justice. It seems to me, therefore, that his evidence

(a) 4 *D. & L.* 393.

ought not to have been received, and, having been received, that there ought to be a new trial." But there the evidence had been received after the defendant's case was closed, and after the plaintiff's advocate had replied; and this irregularity, testifying that the undersheriff who presided was unduly influenced, appears to have been a ground of the decision. In *Deane v. Packwood* (a) (very shortly reported in a note to *Stones v. Byron* (b)), which was likewise a trial before the sheriff, the plaintiff's attorney, after addressing the jury as advocate, was examined as a witness; and *Erle J.* granted a new trial on this ground, but without laying down a general rule on the subject, or professing to extend the authority of *Stones v. Byron* (b). In *Rex v. Brice* (c) it was laid down that, on the trial of an indictment for perjury, the prosecutor shall not be permitted to address the jury; the Court observing: "the prosecutor may be, and generally is, a witness; and it is very unfit that he should be permitted to state, not upon oath, facts to the jury which he is afterwards to state to them on his oath." But there the King was to be considered the party; and the private prosecutor had no right to address the jury, even if he waived his right to be examined as a witness. It was said, at the trial of this cause, that, since the late Evidence Act (14 & 15 *Vict. c. 99.*) passed, it had been decided, both before the Chief Justice of the Common Pleas and the Chief Baron of the Exchequer, that a party cannot be permitted to act as his own advocate and to be examined as his own witness: but, after diligent inquiry, no such decision can be discovered. The validity of the rule contended for is rested on the

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 COBBETT
v.
HUDSON.
(a) 4 *D. & L.* 395, note (b).(b) 4 *D. & L.* 393.(c) 2 *B. & Ald.* 606.

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 CORBETT
 v.
 HUDSON.

authority of the Judge at Nisi prius to regulate the procedure in a way that may be most conducive to the investigation of truth; and the instance was referred to of an order for the witnesses to leave the Court, with an intimation that any witness, who remains in Court or returns into Court before he is called, shall not be examined. But the Judge must be governed by established practice and the general rules of law. With respect to ordering the witnesses out of Court, although this is clearly within the power of the Judge, and he may fine a witness for disobeying this order, the better opinion seems to have been that his power is limited to the infliction of the fine, and that he cannot lawfully refuse to permit the examination of the witness; see *Cook v. Nethercote* (a), *Thomas v. David* (b), *Rez v. Colley* (c). We may hope that, without any positive rule against a party addressing the jury and being examined as a witness on oath on his own behalf, a practice so objectionable is not likely to spring up; for it is not only contrary to good taste and good feeling, but, as it must be revolting to the minds of the jury, it will generally be injurious to those who attempt it. In such a case as the present there is not the smallest colour for resorting to it; for the plaintiff, suing in formâ pauperis, had counsel assigned to him, who must be supposed to have been ready to support at the trial the certificate he had given that the plaintiff had a good cause of action; and an offer was freely made to the plaintiff to postpone the trial till the attendance of this gentleman could be procured.

If the practice does gain ground to a degree seriously

(a) 6 C. & P. 741.

(b) 7 C. & P. 350.

(c) 1 Moo. & M. 329.

injurious to the due administration of justice, the Legislature may interfere, or the Judges, under the authority vested in them, may make a general order whereby it may be prevented in future. But, as the law now stands, we think the Judge at Nisi prius exceeded his authority in refusing to allow the plaintiff to be examined as a witness on oath after addressing the jury as an advocate; and that upon a new trial he must be permitted to do both if he shall be so inclined.

Rule absolute.

1852.

COBBETT
V.
HUDSON.

HUTTON and Another, Assignees of ELIZABETH
ANN YANDALL, a Bankrupt, against CRUTTWELL.

Saturday,
November 6th.

ASSUMPSIT. The declaration stated that defendant was indebted to plaintiffs, as assignees of *Elizabeth Ann Yandall*, a bankrupt, in 500*l.* for money had and received by defendant for the use of the plaintiffs as assignees, and for money due to plaintiffs, as assignees, on an account stated between defendant and plaintiffs. Promise to plaintiffs as assignees.

F., a trader, being indebted to *L.* in 200*l.*, agreed with defendant that, on defendant paying the 200*l.* to *L.*, *F.* would assign by bill of sale all her effects to defendant, to secure the 200*l.*

A deed of assignment was executed, some months after: it contained a power for defendant to enter, and take all the effects which might be on the premises at the time of such entry, and sell them, and, out of the price, to repay himself the 200*l.*, and pay expenses of sale, and pay the residue to *F.* *F.* covenanted to pay the 200*l.* by instalments, and was to remain in possession till default in payment. Afterwards *F.*, who had remained in possession, sold the effects for 567*l.*, and, out of that sum, paid the 200*l.* to defendant.

F. having afterwards become bankrupt, her assignees sued defendant to recover the 200*l.*, and relied on the execution of the deed as an act of bankruptcy and fraudulent against creditors. The jury having found that the deed was not executed with intent to defeat or delay creditors, and the payment not made in contemplation of bankruptcy, and a verdict having thereupon been directed for defendant:

Rule for new trial refused, the execution of the deed not being necessarily in itself an act of bankruptcy. For the transaction was as if the deed had been executed at the time of the payment by defendant to *L.*, which constituted a good consideration between *F.* and defendant; and the clause enabling the defendant to sell after acquired property did not vitiate the transaction.

1852. Plea: Non assumpsit. Issue thereon.

HUTTON
v.
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The particulars claimed 207*l*. 10*s.*, "part of the proceeds of the sale of the bankrupt's effects, paid over to the defendant by or on behalf of the bankrupt, on or about the 17th *March*, 1852."

On the trial, before *Platt B.*, at the last Assizes for the city and county of *Bristol*, it appeared that the bankrupt *E. A. Yandall*, who was a widow, in *March* 1851 kept an hotel of which she was lessee, and was then indebted to a person named *Lansdell* in 227*l*.; for securing which she had executed a bond and warrant of attorney, upon which *Lansdell* entered up judgment. In *April* 1851, *Thomas Cruttwell*, the defendant, who was *Lansdell's* attorney, agreed to pay 200*l*. to *Lansdell* (which *Lansdell* agreed to accept in liquidation of the whole 227*l*.), on the understanding that *Mrs. Yandall* should execute a bill of sale of her effects to the defendant to secure the repayment to him of the 200*l*.

Accordingly, on 12th *June* 1851, she executed an indenture, between herself of the first part and defendant of the second: which recited that she was indebted to defendant in 200*l*. for moneys lent, and that, to secure the repayment thereof with interest, by the instalments after mentioned, it had been agreed that she should execute and give to defendant "a bill of sale of all and singular the household furniture and personal effects of her, the said *E. A. Yandall*, in, about and belonging to the said hotel and premises, with and under such covenants, powers and provisions as are hereinafter contained:" and it was witnessed "that, in pursuance of the said agreement, and in consideration of the said sum of 200*l*. so as aforesaid due and owing from the said *E. A. Y.* to the said *Thomas Cruttwell*, she, the said *E. A. Y.*, doth hereby

1852.

HUTTON
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assign unto the said *T. C.*, his executors, administrators and assigns, all and singular the household furniture, fittings, decorations and effects, stock in trade, wines, liquors, stores, plate and plated articles, linen, glass, china, hardware, culinary and other utensils, implements, goods and things, being of the nature of personal chattels, which are now in, about or belonging to the said hotel and premises, called " &c., " and all the right, title, property, claim and demand whatsoever, at law and in equity, of the said *E. A. Y.* in and to the said chattels and premises, hereby assigned or intended so to be, and every of them and parcel thereof: to have, hold, take, receive and enjoy the same, unto the said *T. C.*, his executors, administrators and assigns, as his and their own property, chattels and effects." Proviso that, in case of payment by *E. A. Y.* to defendant, by instalments of 50*l.* each (on 12th *December* 1851, 12th *June* 1852, 12th *December* 1852, and 12th *June* 1853), with interest at 5*l.* per cent. on the sum due for the time being, the presents were to be void. Covenant for payment of the money by the instalments, with interest. Covenant that, if default should be made in the payment, " it shall be lawful for the said *Thomas Cruttwell*, his executors, " &c., " peaceably and quietly to receive and take unto his and their possession, and thenceforth to hold and enjoy, as well all and every the goods, chattels and premises hereinbefore assigned, or intended so to be, as also all other goods, chattels and effects of the said *E. A. Y.* which shall or may then, or at any time or times thereafter, during the continuance of this security, be or be found in, upon, about, belonging or appertaining to the said hotel and premises, or any other premises which the said *E. A. Y.* may occupy for the purpose of her said

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business or otherwise. And also to sell and dispose of the same goods, chattels and effects respectively, every or any part or parts thereof, either by public auction or private contract" &c., and to receive the moneys arising from the sale, and retain, in the first place, the costs and charges, and, in the next place, so much of the 200*l.* and interest as should be due, and pay the surplus to *E. A. Yandall*. Proviso "that, until default shall be made in payment of some or one of the said instalments of the said sum of 200*l.* or in some payment of the interest thereof at the times and in the manner hereinbefore appointed for payment thereof respectively, contrary to the form and effect of the proviso and covenant hereinbefore contained, it shall be lawful for the said *E. A. Y.*, her executors," &c., "to hold, make use of and possess the said goods, chattels and premises hereby assigned or intended so to be, without any manner of hindrance or disturbance of or by him, the said *T. Cruttwell*, his executors," &c., "anything hereinbefore contained to the contrary thereof notwithstanding."

Mrs. Yandall continued in possession of the hotel and all her effects until *March* 1852, when she offered the effects for sale by public auction. The defendant gave notice to the auctioneer of his bill of sale, and of his claim under it. The effects were sold on 1st *March* 1852, for 561*l.*, out of which she paid to defendant 207*l.* 10*s.*, for principal and interest; and she applied the residue to payment of other debts and other purposes of her own. Shortly afterwards she became, and was duly adjudicated, bankrupt (*a*).

(*a*) No point arose as to the interval between the payment and the bankruptcy, the counsel for the plaintiffs insisting that the payment was not *bona fide*.

On these facts, the counsel for the plaintiffs contended that the deed of 12th *June* 1851 was an act of bankruptcy and fraudulent, and that the defendant was not entitled to retain the 207*l.* 10*s.*, paid to him in pursuance of the deed. The jury, in answer to questions from the learned Judge, found that the deed was not executed with an intent to defeat or delay creditors, and that the payment to the defendant was not made by Mrs. *Yandall* to the defendant in contemplation of bankruptcy. The learned Judge then directed a verdict for the defendant.

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Kinglake Serjt. now moved for a new trial, on the ground of misdirection. The question ought not to have been left to the jury. The deed was necessarily an act of bankruptcy, and fraudulent as against creditors. The bankrupt never herself received the 200*l.*, which was the only consideration for her executing the deed: it was paid over to *Lansdell* by the defendant. No payment was made to her at the time of her executing the deed. [Lord *Campbell* C. J. If the deed was executed in pursuance of a previous understanding, and she received at the time of such understanding an adequate consideration, it is as if the deed had been executed at that time.] Taking the transaction as if the payment to *Lansdell* and the execution of the deed had been contemporaneous, the execution of the deed is still an act of bankruptcy. It divests the bankrupt of all her property, and incapacitates her from carrying on her trade. Even supposing that this disposal of her present stock was protected by the consideration received for it, that cannot extend to a deed authorizing a party at any future time to enter, and take even all after acquired property. No present

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payment can constitute, as against creditors, a good consideration for such an assignment. The case of *Graham v. Chapman* (a), lately decided in the Common Pleas, very much resembles the present, and is an authority for the plaintiffs. There the jury found that the present advance was the moving cause of the execution of the deed: but the Court nevertheless held the deed to be an act of bankruptcy, because it assigned after acquired effects.

Cur. adv. vult.

Lord CAMPBELL C. J., on a later day in this term (*November* 11th), delivered the judgment of the Court.

We think that there ought not to be any rule granted in this case. The jury found that the deed relied upon as an act of bankruptcy was not fraudulent, nor executed in contemplation of bankruptcy. The verdict ought to stand, unless the Judge was bound to rule at the trial that the execution of the deed was necessarily in point of law an act of bankruptcy. There having been an agreement, before the money was advanced, that the security should be given, and the money having been advanced under this agreement, the deed is to have the same effect with respect to creditors as if it had been executed in *April* 1851, instead of the month of *June* following. We think it cannot be impeached by the circumstance of the money being paid directly by the defendant to *Lansdell*, the creditor of Mrs. *Yandall*; for it was in truth an advance to her to enable her to satisfy a pressing demand; and the defendant was her agent in making the payment, in the same manner as if the money

(a) 21 L. J. N. S. C. P. 173.

had remained some time in her actual possession. So far this is the common case of a bill of sale *bonâ fide* given to secure an advance made on the faith of the security, to enable a trader to carry on his business: and it is well established law that such a bill of sale is not an act of bankruptcy, although it would be an act of bankruptcy if the consideration were either wholly or partly an antecedent debt, contracted without security.

But reliance is chiefly placed by my brother *Kinglake* upon a clause in this deed which authorizes the defendant to enter and sell after acquired property; and he refers us to *Graham v. Chapman* (a), as an authority to prove that a deed with such a clause is necessarily an act of bankruptcy. On referring to the case, we do not find any such doctrine laid down in it. There the deed expressly recited that it was given, not only for a further advance, but for an old unsecured debt; and Lord Chief Justice *Jervis* several times over points this out as the chief foundation of his judgment. He likewise remarks upon the power to take after acquired property, which there might have prevented the trader from deriving any benefit whatever from the further advance. But that cannot apply to a case like the present, where the trader did derive the full benefit of the whole sum advanced by its being applied at the time to satisfy the demand of an importunate creditor.

Therefore, without impeaching the authority of that case, we think that the rule applied for should be refused.

Rule refused.

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(a) 21 L. J. N. S. C. P. 173.

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Monday,
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In the matter of *STUART against JONES.*

By stat. 1 & 2
Vict. c. xxxiii.
(local and per-
sonal, public)
s. 18. a paving
rate may be
imposed on
the occupiers
of premises in
B. in the
county of *C.* ;
and, in case of
non payment,
"the same
shall be levied
by distress and
sale of the
goods and
chattels of
such occupier,"
"or shall be
and may be
sued for and
recovered, to-
gether with full
costs of suit,
in any of Her
Majesty's
Courts of
record at
Westminster."

CHARLES POLLOCK moved for a prohibition, on behalf of the defendant in the above plaint, which was in the county Court of *Chester*. The plaint was brought to recover *8l. 10s. 8d.*, part of a paving rate imposed under stat. 1 & 2 *Vict. c. xxxiii.* (local and personal, public)(a). By sect. 18, after authority given to impose a paving rate on the occupiers of houses adjoining the streets in *Birkenhead*, it is enacted that, if the rate be not paid, "the same shall be levied by distress and sale of the goods and chattels of such occupier," "or shall be and may be sued for and recovered, together with full costs of suit, in any of Her Majesty's Courts of record at *Westminster.*"

Charles Pollock, in support of his motion. The application has been made at chambers, before *Crompton J.*, who inclined to think that the county court had no

jurisdiction to entertain a plaint to recover the rates
On motion
for a prohibi-
tion in a plaint
brought to
recover *8l. 10s. 8d.* for such a rate in the county Court of *C.* :

Held that, though the action given by stat. 1 & 2 *Vict. c. xxxiii.* was only in the Superior Courts, it was a plea of personal action within stat. 9 & 10 *Vict. c. 95. s. 58.* ; and the county court had jurisdiction to try the plaint.

(a) "To amend an act passed in the third year of the reign of his late Majesty King *William* the Fourth, intituled 'An act for paving, lighting, watching, cleansing, and otherwise improving the township or chapelry of *Birkenhead* in the County Palatine of *Chester*, and for regulating the police thereof, and for establishing a market within the said township.'"

imposed under stat. 1 & 2 *Vict. c. xxxiii.*; and before *Martin B.*, who inclined to think that it had such jurisdiction. Both Judges agreed that it was a proper case for an application to this Court. Where a right is created by a statute, which gives a specific remedy, that, if no more is said, is the exclusive remedy. Here the distress and the particular action only are given. [*Erle J.* Why should not that action, since stat. 9 & 10 *Vict. c. 95.*, be in the county court?] The action given by the local act is to be in one of the Courts of record at *Westminster*. Supposing the sum to have been under 40*s.*, the old county court would not have had jurisdiction given them to try such an action, which by express words is to be in one set of courts. The reason for this limitation, probably, was that the Legislature thought that a question concerning rates was not likely to be fairly dealt with in a local court, necessarily liable to be biassed by the local prejudices of the place. Then, the state of the law being that the Superior Courts only had jurisdiction to entertain such an action, the county Court act, 9 & 10 *Vict. c. 95.* was passed. By sect. 3 every court "to be holden under this act shall have all the jurisdiction and powers of the county court for the recovery of debts and demands, as altered by this act." The alteration in the jurisdiction of the county court is made by sect. 58, which enacts, "that all pleas of personal actions, where the debt or damages claimed is not more than 20*l.*, whether on balance of account or otherwise, may be holden in the county court, without writ." These words are not sufficient to give the county court jurisdiction over this action; for it is a general rule that general words in a subsequent statute do not abrogate express enactments in a prior statute;

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Forster's Case (a), *Williams v. Pritchard* (b). Stat. 3 & 4 W. 4. c. 42. s. 17. authorizes the sending a writ of trial to "any judge of any court of record for the recovery of debt." It has been held in the Exchequer Chamber that this enactment does not extend to the Judge of the county court; *Owens v. Breese* (c).

LORD CAMPBELL C. J. I have listened to the able arguments of Mr. *Pollock*; but I am only confirmed in my first impression that the county court has jurisdiction in this case. By stat. 1 & 2 Vict. c. xxxiii. s. 18. an action is given to recover the rate in any of Her Majesty's Courts of record at *Westminster*. Then, by a subsequent statute, 9 & 10 Vict. c. 95. s. 58., "all pleas of personal actions, where the debt or damages claimed is not more than 20*l.*, whether on balance of account or otherwise, may be holden in the county court, without writ;" and there is a proviso making some exceptions. This action, given by stat. 1 & 2 Vict. c. xxxiii., is a plea of a personal action; and the sum claimed does not exceed the specified amount: then it comes within the enacting clause of stat. 9 & 10 Vict. c. 95. s. 38. It does not come within any of the exceptions: and I see no reason why such an action should not be brought in the county court, where, no doubt, it will be very well tried.

COLERIDGE J. I go so far with Mr. *Pollock's* argument as to agree that, after the statute had provided that the rate should be levied by distress, no action would have lain had it not been given by express words:

(a) 11 Rep. 56 b.

(b) 4 T. R. 2.

(c) 6 Exch. 916.

but in this statute there are express words giving an action, which certainly is a plea of a personal action. Then stat. 9 & 10 *Vict. c. 95. s. 58.* gives the county court jurisdiction over "all pleas of personal actions." How are these words to be got over? It is suggested that the Legislature gave a remedy in the Courts of record at *Westminster*, and that the intention, to be implied from this, was to guard against local prejudices by confining the remedy to an action in a court of general jurisdiction. But all this is an assumption. It is quite as likely that the action was given in the Courts of record at *Westminster* because there was no court of record having jurisdiction over the spot. We cannot speculate either way: the words of stat. 9 & 10 *Vict. c. 95. s. 58.* give jurisdiction over such a plea to the county court; and there is nothing to restrain them.

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WIGHTMAN J. The question is not as to the right but as to the remedy. The remedy might, by stat. 1 *Vict. c. xxxiii.*, be by a personal action in the Courts of record at *Westminster*. The subsequent act, 9 & 10 *Vict. c. 95.*, gives the county court jurisdiction to hold that personal plea; and the remedy may now be in the county court.

ERLE J. concurred.

Rule refused.

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Monday,
November 8th.

COOK against GILLARD.

A bill of costs, delivered under stat. 6 & 7 Vict. c. 73. s. 37., contained some items for proceedings such as would take place in the Superior Courts, and contained nothing to shew in which of the Superior Courts the business took place. Held: That the bill was sufficient.

DEBT for work and labour &c. as a solicitor.

Pleas. 1. Never indebted. 2. As to 16*l.*, parcel &c., payment. 3. Set-off. 4. No signed bill delivered. 5. As to part, the Statute of Limitations.

Replication: issue joined on the first plea; Nolle prosequi as to the 16*l.*; and traverses of the 3*d.*, 4*th* and 5*th* pleas. On which traverses issues were joined.

On the trial, before *Wightman J.*, at the *Westminster* sittings in *Trinity* term 1852, it appeared that the plaintiff had in due time delivered to the defendant a bill, headed "*Richard Gillard Esq. Dr. To George William Francis Cook;*" and signed by the plaintiff. The items in the bill were divided into four parts. The first part was headed "*Yourself and Ransom.*" It consisted of a charge for attending the defendant and consulting as to slanderous reports; and then, under a fresh head, "*Hilary* term 1846," there were charges for "Letter before action," "Instructions to sue," "Writ of Summons," and "attending settling." The amount of this first part of the bill was 2*l.* 1*9s.* 8*d.* Except in so far as might be inferred from the items above quoted, there was nothing to shew whether the suit of *Gillard v. Ransom* had been pending in any, or which, of the Superior Courts. The second part of the bill appeared from the items to be for conducting the defence of a case at the *Middlesex* Sessions; it amounted to 9*l.* 1*s.* 6*d.* The third part appeared on the face of it to be for

conducting a prosecution at the *Middlesex* Sessions; it amounted to 45*l.* 13*s.* 6*d.* The fourth part of the bill was headed "Yourself and Mrs. *Heydeman*." It contained charges for taking the opinion of counsel on the construction of an agreement, various charges for collecting evidence and making enquiries at *Hatton Garden*, *Tottenham Court Road*, and other places well known to be in *Middlesex*, but which were not stated on the face of the bill to be there: for "instructions to sue in an action on the case;" for "writ" and "service;" for attending in Court, when on motion by counsel "a rule was made to refer all matters in dispute;" and for attending the reference. The amount of this head of the bill was 122*l.* 8*s.* 10*d.* Except in so far as might be inferred from the items above quoted, there was nothing to shew whether the cause of *Gillard v. Heydeman* had been pending in any, or which, of the Superior Courts. The bill then repeated these four sums, with a reference to the page of the bill on which each appeared, summing up the total 180*l.* 3*s.* 6*d.*, and concluded: "This is my bill of costs amounting to 180*l.* 3*s.* 6*d.*

G. W. F. Cook

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Vestry Offices

Old Saint Pancras Road

St. Pancras

Middlesex."

The bill had, before trial, been sent to taxation without prejudice: and it was agreed at the trial that, partly from the amount struck off, and partly by an admitted set-off, the plaintiff's claim was reduced to 100*l.*; which was the sum he was entitled to recover supposing that the bill was sufficient.

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It was contended for the defendant that the first and last parts of the bill were insufficient, as they did not shew in what courts the business there charged for was transacted; and therefore that the bill, being one entire bill, was not sufficient as to any part. For the plaintiff it was contended that the bill was sufficient for the whole; or, if not, that it was divisible and good pro tanto. The learned Judge directed a nonsuit, with leave to the plaintiff to move to set it aside, and enter a verdict for 100*l.* or such portion of the bill of costs as the Court should think reasonable instead thereof.

Keating, in *Trinity* term, obtained a rule nisi accordingly.

Atherton and *Milward* now shewed cause (a). Stat. 6 & 7 *Vict. c. 73. s. 37.* is the enactment now in force requiring the delivery of a signed bill by an attorney before action. Stat. 2 *G. 2. c. 23. s. 23.* was the statute in force before the 22d of *August* 1843, when stat. 6 & 7 *Vict. c. 73.* received the Royal Assent. The enactment now in force is nearly the same as the previous one. One difference, however, is material: stat. 2 *G. 2. c. 23. s. 23.* required that the bill should be referred to taxation by the court "in which the business contained in such bill, or the greatest part thereof in amount or value, shall have been transacted." Stat. 6 & 7 *Vict. c. 73. s. 37.* directs that, "in case any part of such business shall have been transacted in any other court," than a Court of equity, "the Courts of Queen's Bench, Common Pleas, Exchequer, Court of Common Pleas at *Lancaster*, or Court of Pleas at *Durham*, or any

(a) Before Lord *Campbell C. J.*, *Coleridge*, *Wightman* and *Erle Js.*

Judge of either of them," may refer the bill, to be taxed by the officer of their own Court. It will be contended that the effect of this change in the enactment is to render the decisions on the former statute no longer applicable, and that the decisions on the present statute which are favorable to the defendant are founded on a mistake. It is true that one reason why the attorney was required to state in what court each item was transacted has ceased; for it is no longer material in what court the greater part in value was transacted; but the authorities do not proceed on that ground alone. In *Lewis v. Primrose* (a) Lord Denman C. J., speaking of stat. 2 G. 2. c. 23. s. 23., says: "The very object of the enactment is, that the client, if he likes, may take the bill to another attorney for his advice upon it. Why is the client to be forced to ask questions? And how can we say that he is told in respect of what business the charge is made, when he is not told where the business was done." In *Martindale v. Falkner* (b) there was a difference of opinion amongst the Judges, as to whether the bill, in that case, did shew by necessary inference in what court the cause was: but all the Judges agreed that it was necessary it should do so. *Sargent v. Gannon* (c) recognizes the same rule. In *Engleheart v. Moore* (d), which was a decision on stat. 6 & 7 Vict. c. 73. s. 37., Alderson B. gives the reason. The statute requires the delivery of the bill, he says (e), "for the express purpose of giving the client a full opportunity of ascertaining whether the business was done, and whether the charges are reasonable. For this

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(a) 6 Q. B. 265. 268.

(b) 2 Com. B. 706.

(c) 7 Com. B. 742.

(d) 15 M. & W. 548.

(e) 15 M. & W. 552.

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purpose it is very material that the bill should shew in what court the business was done, because the fees are different in different courts: and how can an attorney advise a party as to the propriety of taxing a bill, unless he knows in what court the fees were paid? Without such information, he could not know whether, upon taxation, one sixth of the bill would be struck off or not." In *Ivimey v. Marks* (a) the Court of Exchequer, following up the reason just quoted, decided that a bill, if it did not disclose in what Court the legal business was done, was bad altogether. *Maule J.* thus lays down the rule in *Dimes v. Wright* (b): "Whether a bill which does not *expressly* shew the court and the cause where the business has been done, would be a compliance with the statute, is, perhaps, a thing which is not yet altogether settled. It is, however, settled, that, if the bill is deficient in that information which is essential to enable the party charged to know the court and the cause, with respect to any of the items, it is insufficient." In *Anderson v. Boynton* (c) these cases are approved of. The plaintiff probably relies upon *Keene v. Ward* (d). In that case the Court seem to have proceeded on the ground that it sufficiently appeared that the business was in one of the Superior Courts, and that, as the scale of costs is now the same in all the Superior Courts, it was immaterial in which: but in the present case it does not appear by the bill that the cause was in one of the Superior Courts. There are writs of summons in all borough courts of record; stat. 2 & 3 Vict. c. 27. s. 3. [*Erle J.* I see there is a charge for attending in Court when a rule was made to

(a) 16 M. & W. 843.

(c) 13 Q. B. 308.

(b) 8 Com. B. 831, 835.

(d) 13 Q. B. 515.

refer the cause and all matters in difference. Could that be in an inferior court?] In the Passage Court at *Liverpool* such rules were drawn up at every sitting when *Crompton J.* was Judge of that Court. It was a proceeding which he much encouraged. [*Erle J.* The plaintiff appears by the signature of the bill to be an attorney resident in *Middlesex*. He is at the same time conducting cases at the *Middlesex* sessions for the defendant; and in his bill there are charges for getting evidence in one cause at *Hatton Garden* and *Tottenham Court Road*. It is not strictly impossible that there may be places of that name in *Liverpool*, and that this cause may have been in the Passage Court there: but are we to suppose that, if it was so, the defendant would not know it? I think there is a recent decision of the Common Pleas, *Cozens v. Graham* (a), much against that.] Supposing the bill to be in part deficient, it is bad altogether; *Ivimey v. Marks* (b). *Waller v. Lacy* (c) may be relied on for the plaintiff on this point: that case, in the judgment in *Ivimey v. Marks* (b), was considered to be no authority on the later statute; but in fact the point was abandoned by the defendant's counsel in *Waller v. Lacy* (c). [Lord *Campbell C. J.* In my mind the fact that the counsel, Mr. *Brammell*, abandoned the point makes *Waller v. Lacy* (c) a very weighty authority. *Erle J.* The Court, in *Waller v. Lacy* (c), were not passive instruments in the hands of counsel: they gave judgment that the plaintiff was entitled to recover part.]

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Keating, contra. The question has been fairly

(a) 16 *Jurist*, 952.(b) 16 *M. & W.* 843.(c) 1 *M. & G.* 54.

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brought before the Court. Whilst stat. 2 *G. 2. c. 23. s. 23.* was in force, it was at first doubtful whether the name of the court need appear; *Lester v. Lazarus (a)*. It was afterwards decided that it must appear, for reasons depending on the machinery for taxation given by stat. 2 *G. 2. c. 23. s. 23.* Then came stat. 6 & 7 *Vict. c. 73. s. 37.*, changing the machinery for taxation, and consequently removing these reasons; and the question now is, how far, with the change of reasons, the law should change. The bill may now be taxed in any court. [*Wightman J.* But there is another ground for the rule assigned in some of the cases. The bill, it is said, should give the information necessary to shew whether it is advisable to tax at all. *Coleridge J.* And give it so that a person to whom the client handed the bill for advice would not have to seek it aliunde.] Both reasons are answered by the judgment in *Keene v. Ward (b)*. Stat. 6 & 7 *Vict. c. 73. s. 37.* does not require that the court should be named; and, as the fees in all the Superior Courts are the same, there is no reason for requiring it. It is not easy to see why the bill should give formally every piece of information to the client, or why it should be supposed that this defendant might be in doubt whether he had been suing in the Passage Court at *Liverpool* or not. [*Lord Campbell C. J.* The cases seem to me to proceed on an assumption, contrary to the fact, that a client knows nothing about the litigation in which he is engaged except from the bill. *Erle J.* It is put upon the necessity of enabling a person of competent skill to decide whether the bill is likely to be reduced one sixth, with-

(a) 2 *C. M. & R.* 665.(b) 13 *Q. B.* 515.

out requiring information aliunde. Now I apprehend that a great many items in all bills are such that it cannot be known whether they are of the proper amount without information dehors the bill. For instance, a fee of 5*l.* 5*s.* for a conference may be excessive if the business is simple, and very reasonable if it is complicated.] It is to be remarked that in *Iviney v. Marks* (a) the Court had not their attention drawn to the uniformity of taxation in all the courts, which, as remarked in *Keene v. Ward* (b), now renders it immaterial in which the business was. In the other cases cited the difference between stat. 2 *G.* 2. c. 23. s. 23. and stat. 6 & 7 *Vict.* c. 73. s. 37. does not appear to have been adverted to.

Cur. adv. vult.

Lord CAMPBELL C. J., on a subsequent day in this term (*November* 20th), delivered the judgment of the Court.

In this case the question was, whether an attorney's bill, intended to be delivered according to stat. 6 & 7 *Vict.* c. 73. s. 37., was sufficient. The bill related to several transactions, all of which were properly described, except that there were items, to a small amount, in two actions, for writs of summons and other proceedings such as would occur in actions in the Superior Courts; and there was nothing to indicate in what court these actions were brought. The defendant objected that the bill was therefore invalid; *Iviney v. Marks* (a), *Engleheart v. Moore* (c), *Dimes v. Wright* (d), were cited, in which the rule was laid down, that a charge for an item in an action, without specifying in what court the

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(a) 16 *M. & W.* 843.

(b) 13 *Q. B.* 515.

(c) 15 *M. & W.* 548.

(d) 8 *Com. B.* 831.

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action is brought, renders the bill bad; the reason assigned being, that the client ought to be enabled by the bill to obtain advice as to taxation without the need of further question. But, after considering the provisions of the statute, the change that has been made in the taxation of costs, the reason assigned for the rule, and the late cases on the subject, we have come to the conclusion that the objection ought not to be sustained. Stat. 6 & 7 *Vict. c. 73. s. 37.* forbids an action until a bill for fees, charges and disbursements shall have been delivered. No requisites for the bill are particularized: there is no requirement that the Court should be specified: and the section further declares (a) that the plaintiff is not bound in the first instance, in proving a compliance with the act, to prove the contents of the bill delivered; but it is presumed sufficient unless the defendant proves that it is not such a bill as constitutes "a bonâ fide compliance with this act." The defendant here does not prove that any further information was practically wanted for taxation, or suggest that the name of the court in which the two writs of summons were issued would have been of any use to him: nor does he contend that the act has not in this case been bonâ fide complied with, unless the arbitrary rule to be deduced

(a) By a proviso in stat. 6 & 7 *Vict. c. 73. s. 37.*, "it shall not in any case be necessary in the first instance for such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, in proving a compliance with this act, to prove the contents of the bill he may have delivered, sent, or left, but it shall be sufficient to prove that a bill of fees, charges, or disbursements, subscribed in the manner aforesaid, or enclosed in or accompanied by such letter as aforesaid, was delivered, sent, or left in manner aforesaid; but nevertheless it shall be competent for the other party to shew that the bill so delivered, sent, or left was not such a bill as constituted a bonâ fide compliance with this act." There is nothing equivalent to this proviso in stat. 2 *G. 2. c. 23.*

from the cases above mentioned, that the name of the court as to every item is indispensable, can be maintained. Now this rule, as applied to the existing statute, appears to have originated in a mistake: it was first introduced by Judges applying the provisions of stat. 2 G. 2. c. 23. s. 23.; and then there was good reason for it; for the jurisdiction to tax under that statute is given to the court in which the greater part of the business was done; and it was therefore indispensable for the parties and for the taxing officer to be able to assign each item to its appropriate court, before the taxation could be entered upon: moreover at that time the scale of charges in the different courts was different; so that the name of the court was also wanted in order to estimate the amount of charges. But, under the existing statute, if there is any item in any court of law, jurisdiction is given to all the Superior Courts indifferently; so that in respect of jurisdiction the name of the court is entirely immaterial: and so likewise is it for estimating the amount due, as the scale of charges in all the Superior Courts is now uniform. The Judges, who instituted the rule in relation to the existing statute, adopted it from cases under the former statute, without adverting to the important changes in the law which the Legislature had made; and thereby, as we think, contravened the intention of the Legislature. If this reasoning is correct, it follows that the rule, which so originated, has been maintained without any useful purpose.

The greater number of the later decisions accord with this view of the law. In *Martindale v. Falkner* (a) a bill was decided to be sufficient which shewed by reason-

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(a) 2 Com. B. 706.

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able intendment that the business charged for was done in one of the Courts of Chancery, though there was nothing to shew which of those Courts was intended. In *Anderton v. Boynton* (a) it was held sufficient if the name of the cause and the court could be gathered by intendment from the bill, without being expressly mentioned. In *Keene v. Ward* (b) a bill was held good, although it contained items in an action and did not indicate in what court that action was brought; and in that case the change in the law, in respect of the jurisdiction to tax, and of the uniformity of charge in the different courts, and also the practical result of the supposed rule, was pointed out. This has been followed by a very salutary judgment in *Cozens v. Graham* (c), where a bill was held valid although the court in which the business was done was not mentioned or described, it being clear that the defendant, knowing the court, did not want the information and only made the objection to evade payment of a debt. The judgment there points out that the words of the last statute are complied with although the court is not mentioned in the bill; and also that the changes introduced by the last statute had not been adverted to in the decision now relied on for the defendant. This judgment appears to us to give effect to the true meaning of the statute; the defendant who undertakes to prove that the bill is not a bonâ fide compliance with the act cannot found an objection upon want of information in the bill, if it appears that he is already in possession of that information. It seems to us probable that the Legislature changed the law relating to attorneys' bills from having perceived that a clerical

(a) 13 Q. B. 308.

(b) 13 Q. B. 515.

(c) 16 *Jurist*, 952.

error or an accidental oversight often worked the forfeiture of the remuneration due for many years of professional services; and therefore meant, while it secured the client a right to reasonable information respecting the bill before an action should be brought upon it, at the same time to give to the attorney security that the delivery of a bill intended to give and giving all requisite information should be a compliance with the act, unless the client could shew that information which was really wanted had been withheld.

Upon this principle, and according to these cases, we decide against the objection raised by the present defendant. We consider that the doubt, whether the writs of summons and other proceedings, apparently such as belong to the Courts at *Westminster*, were issued here or in the borough court of some Municipal Corporation, emanated from the ingenuity of the advocate without having had any existence in the mind of the defendant: and that a client has no ground of objection to a bill who is in possession of all the information that can be reasonably wanted for consulting on taxation. We further consider that it would be better to require a demand of further information, so that a bill might be corrected before action, rather than to allow a defendant to conceal a defect till time had become a bar to another action, and then obtain an unfair advantage by disclosing it.

Rule absolute to enter a verdict for 100*l*.

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Tuesday,
November 9th.

BRYAN *against* EDWARD CARRER CLAY, Executor
of BENJAMIN CLAY.

The executor of a deceased incumbent is bound to satisfy simple contract debts before paying for dilapidations by the testator.

Therefore, in a suit on the custom of England for dilapidations, by the successor of a deceased incumbent against the executor, it is a good plea that, since the commencement of the suit, defendant has paid simple contract debts, leaving no assets to be administered.

CASE. The declaration (dated 17th *April*, 1852) stated that, "whereas, by the law and custom of *England* hitherto used and approved of, all and singular the rectors of this kingdom for the time being are bound and ought to repair and sustain the houses, buildings, chancels and tenements of and belonging to their respective rectories, and to leave the same so repaired and sustained to their successors; and, if such rectors do not leave such houses" &c. "to their successors, so repaired and sustained as aforesaid, but leave them out of repair and dilapidated, then the executors or administrators of the goods and chattels of such rectors, after their deaths, having sufficient of the goods and chattels of such rectors, are bound and ought to satisfy to the successors of such rectors such a sum of money as shall be necessary to be expended and paid for the necessary repairing of such houses, buildings, chancels and tenements as aforesaid:" and whereas *Benjamin Clay*, deceased, in his lifetime and at the time of his death, to wit 7th *December*, 1851, was rector of the parish church of *East Worlington*, in *Devonshire*, and was seised, in right of the rectory, of and in a certain messuage, to wit a messuage called *The Rectory*, and of and in certain, to wit twenty, outhouses &c. (enumerating various buildings), and twenty gardens, and of and in the chancel of the parish church, and of and in certain, to wit one thousand, acres of glebe lands, and died so

seised thereof: and plaintiff, after the death of *B. Clay*, to wit on 24th *February*, 1852, was presented to the rectory, and lawfully instituted and inducted into the same, so being void by the death of *B. Clay*, and thereby then became and still is rector of the rectory, and next successor of *B. Clay*: averment that, at the time of the death of *B. Clay*, the said messuage and the said outhouses &c., and the said chancel, and the walls and fences of and belonging to the said gardens and glebe land, were respectively out of repair and greatly dilapidated &c., for want of due repairing by *B. Clay* in his lifetime, and were so left by *B. Clay* out of repair &c., at the time of his death; and that the sums of money necessary to be expended for necessary repairing of the premises amounted to a large &c., to wit 294*l.* 16*s.*; of all which defendant, so being executor &c., after the death of *B. Clay*, and the presentation, institution and induction of plaintiff, and before the commencement of the suit, had notice, and was requested to pay the said sum to plaintiff: Nevertheless defendant, so being executor &c., contriving &c., although defendant, as executor as aforesaid, before and at the time of the commencement of this suit, had sufficient of the goods and chattels of *B. Clay* in his hands to be administered to pay the said sum of 294*l.* 16*s.*, has not yet paid &c.

Plea. That *B. Clay* in his lifetime, to wit on 1st *March* 1825, by his certain writing obligatory &c.; stating a bond executed by *B. Clay* in the penal sum of 600*l.*, "conditioned for the payment of a just debt," to wit 300*l.*, with interest, at a time now elapsed, which was in full force at the time of his death, and on which 259*l.* 13*s.* was due at the time of the commencement of the suit: and that *B. Clay*, in his lifetime, and at the time of his death,

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“was justly and truly indebted to divers persons respectively, to wit” &c. (naming forty one persons), “in divers large sums of money, respectively amounting in the whole (to wit) to the sum of 500*l* ; and which said last mentioned sum of money was at the time of the commencement of this suit wholly unpaid and unsatisfied. And the defendant saith that, after the commencement of this suit, to wit” &c., “and before the pleading hereof, to wit on the 1st day of *May* A. D. 1852, he the defendant paid and satisfied the said debt so due upon the said writing obligatory, and also the said several other debts so due and owing as aforesaid : and that the said several payments, so made by the defendant to pay and satisfy the said several debts, amounted to a large sum, to wit the sum of 759*l* 13*s*. And the defendant further saith that he had, at the time of the commencement of this suit, fully administered all and singular the goods and chattels which were of the said *B. Clay* deceased at the time of his death, which have ever come to his hands to be administered, except goods and chattels of small value, to wit of the value of 604*l* ; and that he, the defendant, had not, at the time of the commencement of this suit, nor has had at any time since, nor hath, any goods or chattels which were of the said *B. Clay* at the time of his death in his hands to be administered, except the said goods and chattels of the value aforesaid, which were not sufficient to satisfy the said debt which was so due in the said writing obligatory as aforesaid, and the said several other debts which were so due and owing as aforesaid, and which have been so paid by the defendant as aforesaid.”

Special demurrer, assigning for cause the points raised on the argument. Joinder in demurrer.

T. K. Kingdon, for the plaintiff. The defendant does not account for the assets in his hands, unless he is entitled to insist on the payments made since the commencement of the action. Now these payments are made in respect partly of a bond and partly of debts which are not shewn to be higher than simple contract debts. As to the bond, the payment is not now impeached: but, the bond alone not exhausting the assets, the question is raised, whether an executor is entitled, after an action has been brought for dilapidations, to exhaust the assets by payment of simple contract debts. Now the rule is that, although, among debts of equal degree, the executor may, before any action is commenced, select which he pleases for payment, yet, after an action has commenced for one of the debts, he cannot pay another to the prejudice of that on which the action is brought. If, indeed, another action be commenced afterwards for a second debt of equal degree, the executor may, by confessing judgment for this last debt, give it priority, and then plead the judgment in answer to the first action (a), as accounting pro tanto for the assets: that, however, has not been done here. So that finally the question is, whether the claim for dilapidations is of as high an order as a simple contract debt. For the defendant reliance will probably be placed on the following passage in 2 *Williams on Executors*, 881 (4th ed.), Part III. B. II. c. 2. s. 3.: "It seems that damages for dilapidations, payable by the executors or administrators of the late incumbent of a benefice to his successor, are to be postponed, in order of payment, to the debts of the deceased of every description." For this the author cites *Degge's*

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(a) 2 *Williams Ex.* 887, 8 (4th edit.). Pt. III. B. I. c. 2. s. 5.

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Parson's Counsellor, p. 91, Part I. ch. 8. ; where it is said: "But there has been made a further question, whether satisfaction for dilapidations should be preferred in payment before debts and legacies? And as the common law prefers the payment of debts before damage for dilapidations; so the ecclesiastical law prefers the damage for dilapidations, before the payment of legacies." This passage in *Degge* appears to be the only foundation of the doctrine that the satisfaction for dilapidations is to be postponed to the payment of all debts. It is referred to in *Godolphin's Repertorium Canonicum*, p. 173 (2d ed.), ch. 15. ; where, after referring to Part I. ch. 8. of the *Parson's Counsellor*, it is said: "The canon law is express and full in all respects relating to this implicit sacrilege, nor doth the custom of England or the common law leave the church without sufficient remedy in this case, albeit it postpones the satisfaction for damages for dilapidations to the payment of debts, as the canon law prefers it before the payment of legacies." The *Parson's Counsellor* was first published in 1676; the first edition of the *Repertorium Canonicum* in 1678, two years later (a); and it is manifest that the latter merely copies the former. In 2 *Gibs. Cod.* 753 (2d ed.), tit. xxxii. c. 3. note s., the author complains of the supposed common law rule; but refers to no authority for it besides *Degge*. He says: "Executors, who are chargeable with dilapidations, are bound to make satisfaction for them, before the payment of any legacies: and it might be hoped, before the payment of any other debts; since the repairing of dilapidations is in the strictest sense a debt to the church; and it seems hard, that private debts should

(a) See *Watt's Bibliotheca Britannica*, vol. 1. pp. 293 y., 421 z., tits. *Degge*, *Godolphin*.

be satisfied out of the spoils of the church, and the church herself be denied the common right of restitution. For whatever substance any incumbent gets from the church, and dies possessed of, is greater, in proportion to his neglect of repairs; and that part that grows from such neglect, is no better than a theft from the church; whose rights and privileges were, anciently, the first care of the law. But we are told by Sir *Simon Degge*, 'That the common law prefers the payment of debts before damage for dilapidations;' and that being the course of the common law, we must be content." [*Coleridge J.* The more reluctant the adoption of *Degge's* doctrine is, the stronger is the inference as to *Gibson's* opinion.] In *Ayliffe's Parergon*, 217, the passage already cited from *Godolphin* is copied literally, and nothing is added. So that all rests upon the authority of *Degge*. [*Coleridge J.* *Degge* is supposed to be the ultimate authority for the maintenance of the action at all, at common law (a).] The authorities for the action are referred to in *Jones v. Hill* (b), the case which, in 2 *W. & M.* (1690), established that this action would lie. [*Coleridge J.* In that case the four Judges were divided in opinion: afterwards, two of them being dead, the surviving two gave judgment for the plaintiff.] Mr Justice *Williams*, it has been seen, uses doubtful language: and the passage does not appear in the first or second edition of his work. [*Lord Campbell C. J.* The later editions represent his mature judgment.]

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(a) *Parson's Counsellor*, p. 94. Part 1. ch. 8. In *Herne's Pleader*, p. 136. tit. *Action on the Case*, is a precedent of a declaration against an executor, *Easter 12 & 13 H. 8.*; and, in the margin, there is a reference to a similar entry of *Trin. 18 H. 7.*, and also, apparently, to entries referred to in *Jones v. Hill*, 3 *Lev.* 268.

(b) 3 *Lev.* 268. *S. C. Curth*, 224.

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No trace of the doctrine appears in the ordinary digests, *Wentworth on Executors*, *Rolle's Abridgment*, *Comyn's Digest*, *Bacon's Abridgement*, *Sheppard's Touchstone*.

[*Coleridge J.* The claim in respect of dilapidations is not in the nature of a debt: it lies upon you therefore to satisfy us that it ranks as high as a simple contract debt.] The general principle is laid down in 2 *Williams on Executors*, 1464, Part IV. Book II. ch. 1. s. 1.: "The general rule has been established from very early times, with respect to such personal claims as are founded upon any obligation, contract, debt, covenant, or other *duty*, that the right of action, on which the testator or intestate might have been sued in his lifetime, survives his death, and is enforceable against his executor or administrator." And in note (1) to *Wheatley v. Lane* (a) it is said that the rule *actio personalis moritur cum personâ* "was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any *other duty* to be performed; for there the action survived." To the same effect is 3 *Bac. Abr.*, 537 (7th edit.), *Executors and Administrators* (P) 2. And the rule is not confined to the case where the testator himself might have been sued; *Ex parte Tindal* (b), where *Plumer v. Marchant* (c) is relied upon in the judgment. [Lord Campbell C. J. This action is quite *sui generis*: there is no person existing from or to whom the money was due in the life of the testator: the action is given *ex necessitate*, as if there had been such persons.] It makes no difference that the claim is for unliquidated damages and not for a specific sum; 2 *Williams on Ex.* 873. Part III. Book II. ch. 2. s. 3., citing *Musson v.*

(a) 1 *Wms. Saund.* 216 b. (6th edit.) See note (a) *ibid.*

(b) 8 *Bing.* 402. 404.

(c) 3 *Burr.* 1380.

May (a). The same doctrine is again laid down at p. 1465. Part iv. Book II. ch. 1. s. 1., where the author refers to *Favocett v. Carter* (b) and *Sanders v. Esterby* (c). The right of action rests in the duty. [Lord Campbell C. J. It was the incumbent's duty to keep the premises in repair, though there was no one to claim.] The duty raises the claim against his executor, on the principles already pointed out: and the right to unliquidated damages has been shewn to be on the same footing as the right to a definite debt. If so, the claim cannot rank lower than a simple contract debt. In *Sollers v. Lawrence* (d) Willes C. J. says that these actions against executors and administrators "have been always holden to be good, because it is not considered as a tort in the testator, but as a duty which he ought to have performed, and therefore his representatives, so far as he left assets, shall be equally liable as himself. And for this reason, it is not contrary to the rule that *actio personalis* (which is always understood of a tort) *moritur cum personâ*; as actions on the case for all sorts of debts and duties are now daily brought against executors, though this was formerly doubted. But the law has been now so settled at least 150 years." This exposition is adopted by the Court of Queen's Bench in *Mason v. Lambert* (e), where additional reasons are given for treating the action as not founded on tort. Nor is this principle disproved by the fact that the plea is Not guilty (g). Such a test has correctly been applied in many instances as shewing that an action is shaped in

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(a) 3 V. & B. 194.

(b) 1 (W.) Jones, 16. S. C. Palm. 329.

(c) Cro. Jac. 417. S. C. 1 Rol. R. 193. 266.

(d) Willes, 413. 421.

(e) 12 Q. B. 795. 799.

(g) This was the plea in *Jones v. Hill*, as appears from the report in Carth. 224. The action there was against the predecessor himself by a successor.

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tort: but in the present case the test is inapplicable, because in this action, founded on the custom of *England*, the form must necessarily be case; and it is that circumstance, not the analogy to a tort, that makes the plea of Not guilty proper. In note (a) upon note (1) to *Wheatley v. Lane* (a) the passage in *Sollers v. Lawrence* (b) is cited; and it is added: "It is observable, however, that this action is in form an action on the case in tort: and that it could not possibly be framed in assumpsit, as on a contract; for the plaintiff must be the succeeding rector, &c. who cannot be known until after the death of the predecessor, and of course could not contract with him. Formerly it was doubted, whether any action at *law* would lie for dilapidations, even by a succeeding rector, &c. against his predecessor, who had vacated by cession or otherwise; but this point was determined in 3 *Lev.* 268. *Jones v. Hill* (see also 2 *T. R.* 630. *Radcliffe v. D'Oyly*); and the temporal Courts having once taken cognizance of such matters, it should seem that the action was considered to lie against the executors of a deceased rector, &c. from the necessity of the thing, and it is at this day of common occurrence." "It is clearly an exception to the general rule, that no action will lie against an executor to which his testator was not liable; for the testator never can be liable, inasmuch as during his life there is no person who can sue. For the same reason this action, however anomalous in other respects, is not contrary to the rule, that *actio personalis moritur cum personâ*: an action cannot be said to die, which never had nor could have had existence." It appears that in this instance the Courts have sacrificed the form to the substance. Lord Mans-

(a) 1 *Wms. Saund.* 216 b.(b) *Willes*, 421.

field, in *Hambly v. Trott* (a), where it was decided that trover would not lie against an executor for a conversion by his testator, insists upon the circumstance that "in most, if not in all the cases where trover lies against the testator, another action might be brought against the executor, which would answer the purpose." Here, where from necessity the action against the executor is shaped in case, Lord *Mansfield* must have allowed the action, in conformity with what was then unquestioned law, and yet could not have treated it as an action of tort. This is enough to shew that all reasoning grounded on the peculiarity of the form of action, as shewing that the claim is for a tort, is fallacious: if the action were tort, it could not lie at all (b). Stat. 3 & 4 W. 4. c. 42. s. 2. enlarges the common law right: it enacts that "an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person." [Lord *Campbell* C. J. That does not include your case: possibly it may include

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(a) 1 *Coop.* 371. 375.

(b) According to the ordinary form of declaring, the declaration deduces a duty in the executor himself, and complains of the tort *by him* in not performing the duty.

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the case of an incumbent who permits dilapidations and dies after the institution and induction of the successor.] It might perhaps do so. But the Legislature appears to have assumed that such a claim is to take its place with simple contract debts: and it may be inferred that claims of the same kind, for which no new enactment was required, would do so too. If not, the satisfaction of this claim will now be postponed, not only to simple contract debts, but to the satisfaction of the torts which are comprehended in the statute. [Coleridge J. In what order, as among themselves, are claims for damages to be satisfied?] No greater difficulty can arise in that respect than in respect of the order of specialty debts among themselves, or of simple contract debts among themselves. The difficulty, if it be one, would prevent the satisfaction of this claim at all.

It is possible that *Degge* may have fallen into error from a false analogy which might have appeared to suggest itself in the then state of the law. Debt on simple contract would not lie against an executor, because he could not wage his law, whereas a defendant was entitled to wage his law in debt on simple contract, though not in debt on specialty. This restriction was evaded by allowing a recovery in assumpsit, in the form of damages, to which the same difficulty could not apply, inasmuch as there was no wager of law against a claim for damages. Even this, however, was matter of dispute till the decision in *Pinchon's Case* (a), as appears also from *Slade v. Morley* (b), referred to in note (1) to *Wheatley v. Lane* (c).

(a) 9 Rep. 86 b.

(b) Yelv. 20. See *Norwood v. Read*, Plowd. 180.; and the note of the reporter at the end of the case, p. 183.

(c) 1 Wms. Saund. 217 a.

Now, while it was thought that an executor could not be liable at all upon the simple contract of this testator, it would be a correct inference that a claim for damages in respect of dilapidation, not being of as high a nature as a specialty debt, must be postponed to all debts for which an executor was liable. A similar mistake arose as to the wages of servants, which, it has been thought, should be satisfied before other simple contract debts; an error arising from applying to all servants the provision in the Statute of Labourers (*a*), as to which it had been decided that the labourer there mentioned might maintain debt for wages against an executor; and, again, inferring from this that the debt in such case was of a higher nature than simple contract debt for wages against an executor; 2 *Williams Ex.* 880, note (*s*), Part III. Book IV. ch. 2. s. 3.

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Montague Smith, *contra*. The true explanation of the inconsistencies in the law, which are apparent from the authorities cited on the other side, is, that the action is itself altogether anomalous. No principle derived from the ordinary analogy of the law can be applied to it. It appears from the citations on the other side that the authorities are unanimous; in some instances discontent with the state of the law is expressed; but that only makes the admission more authoritative, coming too, as it does, from ecclesiastical writers. The history of the action appears in 2 *Gibb. Cod.* 753 (2d ed.), tit. xxxii. ch. 3., in the note (*t*) upon stat. 13 *Eliz. c.* 10., which was passed to meet the abuse of ecclesiastical persons, who had committed dilapidations, conveying away their

(*a*) Stat. 23 *Ed.* 3. See *Yearb. Pasch.* 4 *H.* 6. fol. 19 B. pl. 5. Also stat. 5 *Eliz. c.* 4.

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goods. *Gibson* points out the original remedy in the Ecclesiastical Courts for dilapidations. He there states that "the first writer who advanced the notion of an action upon the case in the temporal Courts, for dilapidations, was Sir *Simon Degge*; who also referred, for proof of it, to divers precedents before the Reformation." *Gibson* then gives an account of the case of *Jones v. Hill* (a), pointing out that it there appeared that judgment was not in fact given in any of the precedents cited by *Degge*. The language in which the law is laid down by *Degge* and those who have followed him is quite incompatible with the theory suggested as to the origin of *Degge's* view. For it is said that the dilapidations shall be paid for after the debts but before the legacies; whereas, if the explanation suggested were correct, the law would have been laid down that the executor was not liable at all for the dilapidations. It would be as reasonable to contend that the action does not lie at all, as to contend that the incident which has always been attached to it is to be separated. The doctrine of *Degge* is adopted also in *Grey's System of English Ecclesiastical Law*, p. 250 (4th ed.), and in 2 *Burns's Ecc. L.* 148. tit. *Dilapidations*. In the latter book, at p. 153 a (9th ed. by *Phillimore*), is an opinion given by Lord *Stowell*, then Sir *William Scott*, when at the bar, in which he takes for granted that debts are preferred to dilapidations. The same law is laid down in *Tomlins's Law Dictionary*, tit. *Dilapidation*. It is therefore not the fact that the doctrine has not been received into the text books. This is the only instance, before stat. 3 & 4 *W. 4. c. 42.*, in which an executor was liable in tort. [Lord *Campbell* C. J. And where his

(a) 3 *Lev.* 268.

testator was not liable in his lifetime.] In some cases of contract, an executor may be liable though his testator was not, as where a man contracts for payment of money by his executors after his death: but, though there may be instances of contract in which the executor is not liable, there are none (except by statute) where he is liable without contract; 2 *Williams Ex.* 1470. Part iv. B. II. ch. 1. s. 1. [*Coleridge J.* Have you any precedent of such a plea as this?] No: this plea is framed from the analogous plea of debts of higher degree.

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T. K. Kingdon, in reply. The opinion of Sir *W. Scott* is merely that of counsel. [*Lord Campbell C. J.* It may be put on a footing with the *responsa prudentum*.] He may have been speaking of specialty debts. In the passage in *Tomlins's Law Dictionary* the reference is only to *Herne's Pleader*, p. 136., where nothing appears but a precedent of a declaration (a). It is argued that it is as reasonable for the defendant to deny that the action lies at all as for the plaintiff to object to the incident supposed to attach to the action: in fact, the argument on the other side, if true to any extent, does shew that the action does not lie: and this proves that the argument is inadmissible.

LORD CAMPBELL C. J. This case has been argued with very great ability on both sides: and we are prepared now to express our clear opinion that the defendant is entitled to judgment. The action is on the custom of the realm, which is set out in the declaration, and is a very peculiar one, not founded on any common principle of English law, inasmuch as ordinarily an ex-

(a) See *anté*, p. 43. note (a).

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ecutor is not liable in tort, nor where no cause of action, or foundation of action, has accrued in the lifetime of the testator. The action is given to a succeeding incumbent, who is allowed to sue his predecessor, or the executor of a deceased predecessor, for want of repair. This is altogether anomalous, and founded on custom. That being so, we are to see what the custom is, and are bound by its incidents. Then how are we to learn what the custom and its incidents are? From authority. The earliest authority is Sir *Simon Degge*: he lays down, in the most express terms, that, though the action is maintainable, the satisfaction of the claim must be postponed to the payment of all debts, in which he clearly includes simple contract debts. Then every subsequent writer on this subject has assented to this law, both as to the action being maintainable and as to the postponement. Then we have the opinion of Sir *William Scott*, a very high authority, which shews, to say the least, the universal understanding that the law is as laid down by *Degge*. The expression of discontent, by Bishop *Gibson*, adds much to the weight of his opinion; for, though he thinks that there is hardship in the state of the law, and wishes that the claims for dilapidations were preferred before the payment of any debts, he does, however reluctantly, submit to the law as laid down. The authorities are uniform, down to and including the last edition of the work of my brother *Williams*: he does indeed use the words "it seems;" but that must be only because the point had not been expressly decided; and we should not be warranted in inferring any doubt from that expression. It seems to me, therefore, that the postponement is part of the custom, and that the plea is good.

COLERIDGE J. I am of the same opinion. I think that, after Mr *Kingdon's* argument, we may fairly assume that no further authorities remain to be examined; otherwise, we might have wished for time to deliberate. The case comes to this: that the whole action is anomalous, founded on custom, and known only from ecclesiastical authority, and we must take one part of the custom with the other as we find it. The ecclesiastical authorities are most familiar with the question in what order claims are to be satisfied: and they lay it down that the claim is postponed in law to the payment of debts. Before the work of *Degge* was published, and earlier than any of the authorities which have been cited, stat. 13 *Eliz. c. 10.* passed, which provides only for a particular case, alienation by incumbents of their goods and chattels with a view of defeating their successors of remedies for dilapidations against their executors. It is remarkable that sect. 2 gives to the successor a remedy in the Ecclesiastical Court against the alienee in such sort as if the alienee were executor. It is therefore open to argument that the liability of the executor was known as early as 13 *Eliz.*: but whether that liability was enforced only in the Ecclesiastical Court does not appear.

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WIGHTMAN J. This action is framed, not on the general law of the land, but on a custom which has become part of the common law. The first authority for the action is Sir *Simon Degge*, who makes the postponement of the claim incidental to the custom, and a part of it, as all subsequent writers do: and there is no authority the other way. The declaration is founded especially on the custom: and therefore all the incidents of the custom attach.

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ERLE J. The law on which the plaintiff relies is traced to the custom: the plaintiff therefore adopts the custom: and, if he does adopt it for his benefit, he must adopt it with the burthen.

Judgment for defendant.

*Wednesday,
November 10th.*

ANNE ELIZA ELIZABETH HENNIKER *against*
JOHN HENNIKER.

Debt on bond. Plea: that it was given to secure the payment of 660*l.* and interest agreed, after the passing of stat. 55 G. 3. c. 184., to be paid for equality of partition of certain lands in which plaintiff and defendant were interested; and that on the principal deed, by which plaintiff conveyed to defendant her interest in the estate taken in severalty by defendant, no mention was made of this sum. On demurrer:

DEBT on bond for 1600*l.*, dated 25th *March*, 1829.

The defendant set out on oyer the condition, which was for the payment of 800*l.* and interest. He then pleaded: That Sir *F. Henniker, A. B. Henniker, J. B. Henniker*, the plaintiff and the defendant were seised in fee as tenants in common of certain manors and lands. The plea then stated an agreement between the five persons above named, who were brothers and sister. By this agreement, which was made in the year 1825, for the purpose of making a partition and exchange between them of their interests in the lands held in common by the *Henniker* family, it was, amongst other things, agreed that the defendant should take the entirety of the estate of *Compton Martin*, one of the estates held in common, in lieu of his undivided share in that and the other estates, and should pay to Sir *F.*

Held: That stat. 48 G. 3. c. 149. s. 24. (incorporated by stat. 55 G. 3. c. 184. s. 8.) applied only to sales properly so called; and that an exchange upon which money was paid for equality of partition was not a sale. And, therefore, that the enactment in that section, enabling the purchaser to recover from the seller any part of the purchase money not expressed in the deed of sale, was inapplicable.

Held, also, that, though the deed ought to have been stamped with an *ad valorem* stamp as an exchange, the improper stamping of the conveyance was no bar to an action on the bond given to secure the price.

Henniker 2980*l.*, to *A. B. Henniker* 380*l.*, and to the plaintiff 660*l.*, making in the whole 4020*l.*, for equality of partition, and for the conveyance to the defendant of that manor and estate: and that the plaintiff and the other three members of the *Henniker* family should respectively take in severalty other lands. The defendant then averred that afterwards, and after the death of Sir *F. Henniker*, the bond was executed for the purpose of securing to the plaintiff payment of the 660*l.* and interest; and averred that the 800*l.* was "the purchase or consideration money agreed to be paid by the defendant to the plaintiff for equality of partition, and for the conveyance thereafter mentioned together with interest;" and that the bond was in truth executed of even date with that conveyance. The plea then made profert of an indenture made between the said *A. B. Henniker*, then Sir *A. B. Henniker*, and the three other surviving members of the *Henniker* family, bearing date *February* 1829, being the conveyance. It was subsequently set out on oyer. The plea then proceeded to aver that, "at the time of the said conveyance to the defendant of the said four undivided parts or shares of the said manor and estates of and at *Compton Martin* as aforesaid, a duty was and is imposed on such conveyance thereof, in the schedule annexed to" stat. 55 *G. 3. c. 184.*, "in proportion to the amount of the purchase or consideration money expressed in or upon the said deed of partition and conveyance to the defendant as aforesaid." "That the full purchase or consideration money, which was as aforesaid so agreed, and which by the said writing obligatory was so secured, to be paid by the defendant to the plaintiff as aforesaid for equality of partition and for the said conveyance to the defendant of the said four

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undivided parts or shares of and in the said manor of and estates at *Compton Martin* as aforesaid, to wit the said sum of 800*l.* in the said condition of the said writing obligatory mentioned, was not, nor was any part thereof, according to the form of the statute in such case made and provided, truly expressed or set forth in words at length in or upon the said deed of partition and conveyance to the defendant bearing date" &c.; "the said deed of partition and conveyance being the principal deed whereby the said four undivided fifth parts of and in the said manor" &c. "were granted, bargained, sold," &c. "to, and vested in, the defendant as aforesaid; nor was nor is the said sum of 800*l.*, in the said condition of the said writing obligatory mentioned, in any way or manner mentioned or referred to in or upon the said deed of partition and conveyance to the defendant: contrary to the form of the statute in such case made and provided." Verification. The plaintiff set out the indenture on oyer. It bore date *February* 26th, 1829, and was between Sir *A. B. Henniker, J. B. Henniker*, the plaintiff and the defendant. It recited the making of an agreement, between the four parties to the deed and Sir *F. Henniker* deceased, for the partition of the estates; by which the defendant was to take the manor &c. of *Compton Martin* in lieu of his undivided share in the whole; but it omitted all mention of the agreement by which defendant was to pay money for equality of partition. It then recited the death of Sir *F. Henniker*, and that Sir *A. B. Henniker* was his heir and administrator. By the operative part, the three other parties, in consideration of the conveyances made to them respectively by the defendant and of a nominal money consideration, conveyed by lease and release to

the defendant their respective interest in the manor &c. of *Compton Martin*.

Demurrer. Joinder in demurrer.

The demurrer was now argued (a).

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Unthank, for the plaintiff. The case depends upon the construction of the two stamp acts, 48 *G. 3. c. 149.* and 55 *G. 3. c. 184.* By stat. 48 *G. 3. c. 149. s. 22.* it is enacted that, "in all cases of sale of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any right, title, interest or claim, in, to, out of, or upon any lands," &c., "where a duty is imposed on the conveyance thereof, in the schedule hereunto annexed, in proportion to the amount of the purchase or consideration money therein or thereupon expressed, the full purchase or consideration money, which shall be directly or indirectly paid, or secured or agreed to be paid for the same, shall be truly expressed and set forth" on the principal deed of conveyance, under a penalty imposed upon both purchaser and seller of 50*l.*, and five times the excess of duty. By sect. 24, it is enacted that, "where the full purchase or consideration money shall not be truly expressed and set forth, in the manner hereby directed, it shall be lawful for the purchaser or purchasers, or any of them, or his, her, or their executors or administrators, to recover back from the seller or sellers, or his, her, or their executors or administrators, so much and such part of the purchase or consideration money as shall not be expressed and set forth as aforesaid, or the whole thereof, if no part of the same shall be so expressed and set forth," by an action in the Courts of *England* or *Scotland*. By the schedule to

(a) Before Lord Campbell C. J., Coleridge, Wightman and Erle Js.

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that act, duties are imposed under the head "Conveyance, whether grant, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, upon the sale of any lands," &c. (repeating the words of sect. 22 above set out) in respect of the deed, "Where
 "the purchase or consideration money, therein or there-
 "upon expressed, shall not amount to 50*l*. 15*s*.
 "And where the same shall amount to 50*l*. and not
 "amount to 150*l*. . . . 1*l*.
 "And where the same shall amount to 150*l*. and not
 "amount to 300*l*. . . . 1*l*. 10*s*."
 and progressively higher duties according to the amount.

Under the head "Exchange of lands, or other hereditaments or hereditible subjects, whether any sum of money shall be paid for equality of exchange or not—1*l*. 10*s*. 0*d*."

Stat. 55 *G.* 3. c. 184. was in force when this conveyance was executed. By sect. 8 it is enacted "That all the powers, provisions, clauses, regulations and directions, fines, forfeitures, pains and penalties, contained in and imposed by the several acts of parliament relating to the duties hereby repealed, and the several acts of parliament relating to any prior duties of the same kind or description, shall be of full force and effect with respect to the duties hereby granted, and to the vellum, parchment and paper, instruments, matters and things, charged or chargeable therewith, as far as the same are or shall be applicable, in all cases not hereby expressly provided for, and shall be observed, applied, enforced and put in execution for the raising, levying, collecting and securing of the said duties hereby granted and otherwise relating thereto, so far as the same shall not be superseded by, and shall be consistent with the express provisions of this act, as fully and effectually to

all intents and purposes, as if the same had been herein repeated and especially enacted with reference to the said duties hereby granted." In the schedule to stat. 55 G. 3. c. 184., duties are imposed under the head "Conveyance, whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, upon the sale of any lands," &c., on the deed.

"Where the purchase or consideration money

"therein or thereupon expressed shall not

"amount to 20*L* 10*s*.

"And where the same shall amount to 20*L* and

"not to 50*L* 1*L* 0*s*.

"And where the same shall amount to 50*L* and

"not to 150*L* 1*L* 10*s*.

"And where the same shall amount to 150*L*

"and not to 300*L* 2*L* 0*s*."

and progressively higher duties ad valorem.

Under the head "Exchange," "Any deed, whereby any lands or other hereditaments or heritable subjects in *England* or *Scotland* shall be conveyed, or any copyhold or customary lands or hereditaments in *England* shall be covenanted to be surrendered in exchange for other lands or hereditaments or heritable subjects;"

"If no sum of money, or only a sum under

"300*L* shall be paid or agreed to be paid

"for equality of exchange; the ordinary

"duty of 1*L* 15*s*. 0*d*."

"And if a sum of { the same ad valorem duty as
300*L*, or upwards shall { for a conveyance on the sale of
be paid or agreed to { lands for a sum of money equal
be paid for equality of { to the sum so paid or agreed to
exchange { be paid."

There can be no doubt that an ad valorem stamp

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duty was payable in respect of the deed in the present case, as it was an exchange where more than 300*l.* was agreed to be paid for equality of exchange. The parties are made liable to revenue penalties in consequence of their having improperly stamped a deed: the deed itself is not void; *Robinson v. Macdonnell* (a), *Doe dem. Kettle v. Lewis* (b). Neither could the payment of the consideration be resisted merely on the ground that the deed was ill stamped; *Mann v. Lent* (c). It might be otherwise if it were shewn that it was part of the bargain that the statute should be violated; *Forster v. Taylor* (d). But nothing is alleged, in this plea, inconsistent with the supposition that the plaintiff innocently executed the deed which her brother the defendant caused to be drawn up in the way that suited his purpose. The question therefore is reduced to that of the effect of stat. 48 *G. 3. c. 149. s. 24.* The section does not apply to all deeds where there is an ad valorem duty, but only to those in which the consideration money is by that act directed to be set forth, that is in case of a sale. Assuming that the effect of stat. 55 *G. 3. c. 184. s. 8.* is to make sect. 24 of stat. 48 *G. 3. c. 149.* applicable to the new duties imposed in the schedule to stat. 55 *G. 3. c. 184.*, still it would only apply where the duty was imposed in respect of a sale. And it is clear that the Legislature did not, either in the one statute or the other, consider an exchange, with money paid for equality of partition, as a sale. The duty imposed by the schedule to stat. 48 *G. 3. c. 149.* on an exchange is an unvarying sum of 1*l.* 10*s.* 0*d.*; which is greater than the progressive ad valorem duty imposed by that act on

(a) 5 *M. & S.* 228.(b) 10 *B. & C.* 673.(c) 10 *B. & C.* 877.(d) 5 *B. & Ad.* 887.

a sale where the price is less than 150*l*.; and smaller than that where the price is more than 300*l*. And in the schedule to stat. 55 *G. 3. c. 184.* the ad valorem duty on the sum paid for equality of exchange does not begin till that sum amounts to 300*l*.; but the duty on an exchange, where the sum given for equality of exchange is below 300*l*., is an unvarying sum of 1*l*. 15*s.* 0*d.*, which is from 5*s.* to 25*s.* more than the duties imposed on sales for sums below 150*l*. It is clear that the word "sale" is used in both statutes in its popular sense; *Denn dem. Manifold v. Diamond* (a), *Massy v. Nanney* (b), *Blandy v. Herbert* (c). The defendant may rely upon *Gingell v. Purkins* (d), where a lease, granted in consideration of a premium, was held within this enactment, so as to entitle the lessee to set off against the rent the premium which was not expressed in the instrument. But that case proceeded on the ground that the word "lease" is expressly inserted, under the title "Conveyance," in the schedule to stat. 55 *G. 3. c. 184.*

Lastly; supposing the defendant right in his construction of the statute, and that he is entitled to recover back the price, namely 660*l*., that cannot be a bar to this action, where the legal debt is 1600*l*.; and the amount which the plaintiff would be entitled to levy, if she obtains judgment, consists not only of 660*l*., but also of an arrear of interest due before the conveyance impeached was executed.

Willes, contra. It is not to be disputed that the price of the estate may be recovered though the deed is ill stamped, if the effect of the statute is merely to

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(a) 4 *B. & C.* 243.(b) 3 *New Ca.* 478.(c) 9 *B. & C.* 396.(d) 4 *Exch.* 720.

1852. impose revenue penalties; *Mann v. Lent* (a). But stat. 48 G. 3. c. 149. s. 24. goes much farther; it expressly enacts that the consideration money shall not be retained by the seller. If this transaction is within that enactment, the bond cannot be enforced without directly effecting that which the Legislature meant to forbid; and, as whatever sum is recovered in this action might immediately be recovered back in an action on that enactment, this plea is good in substance on the principle of avoiding circuity of action; *Connop v. Levy* (b). Stat. 48 G. 3. c. 149. s. 24. is incorporated in stat. 55 G. 3. c. 184. by sect. 8, so as to apply to ad valorem duties granted for the first time by that latter statute. Thus it applies to conveyances by lease, though that word was not in the schedule to stat. 48 G. 3. c. 149., title "Conveyance;" *Attorney General v. Brown* (c). The enactment is, according to the authorities, to apply only to sales: but that word is to be understood in the sense which it bears amongst conveyancers, not in the popular sense of the word. No person in popular language would call a lease, granted for rent and a premium, a sale of the lands; yet the statute applies to such a transaction; *Attorney General v. Brown* (c), *Gingell v. Purkins* (d), *Doe dem. Kettle v. Lewis* (e). Such a transaction as the present is, in accurate language, an exchange of part of the interest of the plaintiff, and a sale of the rest.

Unthank was heard in reply.

Cur. adv. vult.

(a) 10 B. & C. 877.

(b) 11 Q. B. 769.

(c) 3 Exch. 662.

(d) 4 Exch. 720.

(e) 10 B. & C. 673.

Lord CAMPBELL C. J., on a subsequent day in this term (*Nov.* 20), delivered the judgment of the Court.

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This was an action of debt upon a bond, which in form was a common money bond, with a condition that it should be void upon payment of 800*l.* and interest at a time specified. The defendant by his plea set out a deed of partition of certain real property between the plaintiff and the defendant and other persons; by which their several shares were ascertained and divided, and upon the face of which deed a nominal consideration only for the plaintiff's becoming a party to it was stated; and the defendant alleged that the plaintiff was in fact to receive 660*l.* for equality of partition, which with an arrear of interest made up the sum of 800*l.*; and that the real consideration for the plaintiff's agreeing to the partition and executing the deed was the sum of 660*l.*, which ought to have been stated as the consideration in the deed; and that the bond was given to secure the payment of that sum and interest, contrary to the statute. To this plea the plaintiff demurred: and upon the argument two points were made on the part of the defendant: first, that the deed of partition was an instrument upon which, under stat. 48 *G.* 3. c. 149. s. 22. (incorporated for this purpose with stat. 55 *G.* 3. c. 184.), the true consideration ought to have been expressed; and, secondly, that, if that were so, the plaintiff could not recover upon the bond, which was given to secure the payment of the true consideration; inasmuch as, if it were paid, it might be recovered back again under stat. 48 *G.* 3. c. 149. s. 24. Upon this second point, however, it is unnecessary for us to give any opinion; as we do not think that the provisions of stat. 48 *G.* 3. c. 149. ss. 22. 24. are applicable to the transaction

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in question; which was a partition, and not a sale. By the 22d section of that statute, it is enacted that in all cases of *the sale* of any lands or other property, real or personal, or of any right, title, interest or claim in, to, out of, or upon any property, where a duty is imposed on the conveyance thereof in the schedule to the act annexed in proportion to the amount of the purchase or consideration money therein expressed, the full purchase or consideration money which shall be directly or indirectly paid or secured, or agreed to be paid, for the same shall be truly expressed upon the principal deed whereby the thing sold shall be conveyed to or vested in the purchaser or any other person by his direction. By stat. 55 G. 3. c. 184. the former duties are repealed, and new duties are granted; and by the 8th section all the powers and provisions of former acts are extended to that act, so far as they are applicable. In the schedule to stat. 55 G. 3. c. 184. an ad valorem duty is imposed upon *the sale of land* or other property; and in the same schedule an ad valorem duty is also imposed upon any deed of partition, where any sum amounting to 300*l.* or more is paid for equality of partition. The statute expressly distinguishes between a sale and a partition. In the case of a sale, an ad valorem duty is to be paid, whatever the price may be, according to the scale in the schedule; but, in the case of a partition, the ad valorem duty is only payable where the sum paid for equality of partition is 300*l.* or upwards. The obligation to express the consideration in the principal deed is by the statute imposed in cases of the sale of property, and not in cases of the partition of property; and such an obligation would only be extended by necessary intendment, for which we find no reason in

the present case. In *Denn dem. Manifold v. Diamond* (a) it was decided that a conveyance of an estate by a father to his son in consideration of natural love, and also of a bond for 1500*l.* by the son to augment his sisters' portions, not being a *sale* by the father to the son, did not require an ad valorem stamp. In the present case an ad valorem duty would be payable upon the deed as upon a partition, but not as upon a sale; and the case of *Denn dem. Manifold v. Diamond* (a) is an authority for confining the provisions of the statutes relating to the imposition of duty upon sales of property to sales properly so called. It appears to us that the transaction in question cannot be considered to be a *sale* of property; and, if not a *sale*, that the provisions of the 22d section of stat. 48 G. 3. c. 149. do not apply to it; and that it was not necessary to express the sum to be paid for equality of partition upon the deed. In this view of the case, we can see no legal objection to the plaintiff's right of action; neither the partition nor the deed is void by the improper stamp, which may even now be corrected upon payment of a penalty. The case of *Mann v. Lent* (b) is in point to shew that in such a case as the present a security for the consideration is valid and may be enforced.

Our judgment therefore is for the plaintiff.

Judgment for plaintiff.

(a) 4 B. & C. 243.

(b) 10 B. & C. 877.

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Wednesday,
November 10th.

CASTELLI against BODDINGTON.

Assumpsit, to recover a partial loss on a valued policy of insurance on goods on a voyage to a market; premium, 60s. per cent., to return 23s. 9d. if landed in the *United Kingdom*:

Plea 1:
Set-off for premiums. Demurrer.

Held, a bad plea, as the action was for unliquidated damages.

Plea 2:
Bankruptcy of plaintiff before action. Replication: A transfer of the goods, and an assignment of the contract of insurance to *F.*, before the bankruptcy, with an averment that plaintiff sued as trustee for *F.* Rejoinder: That the goods were landed in the *United Kingdom*; and that the right to have a return of premium was not transferred from plaintiff before bankruptcy. Demurrer.

Held: That the rejoinder was bad; as, though the right to recover back the premium passed to the assignees, it was severable from the right to recover on the contract of indemnity; and therefore defendant could not insist that the assignees, having an interest in part of the contract, had the interest in the whole.

ASSUMPSIT on a valued policy of marine insurance, on goods from *Havannah* to a market in *Europe*, not south of *Havre*; at a premium of 60s. per cent.; to return 23s. 9d. per cent. if the risk ended in the *United Kingdom*, 19s. if at *Gothenburg* or *Copenhagen*, 14s. 3d. if in *Holland* or *Belgium*, or 9s. 6d. if at any other port not north of *Hambro*. Mutual promises. Averment of partial loss by perils of the sea. Breach: non-payment thereof.

Plea 4: A set-off for premiums: verification.

Demurrer. Joinder in demurrer.

Plea 6: Bankruptcy of plaintiff before action: verification. Replication: That before the bankruptcy an assignment was made by the plaintiff to *Thomas* and *Richard Fudge* of the goods insured; averment that plaintiff did then "transfer and deliver the said policy of insurance, and all the right and interest of the plaintiff to recover the said loss, to the said *Thomas* and *Richard Fudge*, and thereby then ceased to have or retain any beneficial interest in the said" goods, "or in the said loss or damage to be recovered under the said policy or by virtue thereof." Averments of notice of assignment, and that the plaintiff

sued as trustee for the *Fudges*, and not for the assignees under the bankruptcy: verification. Rejoinder: That the risk ended in the *United Kingdom*; and plaintiff became before his bankruptcy entitled to a return of premium, which was still unpaid, and was in no way assigned or parted with by plaintiff: verification.

Demurrer; assigning as cause, amongst others, that the rejoinder was an argumentative traverse of the replication. Joinder.

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Watson, for the plaintiff. The plea of set-off is bad. The action is not for a debt, but for unliquidated damages. It is on a contract to indemnify, to which a set-off cannot be pleaded; *Hardcastle v. Netherwood* (a), *Grant v. The Royal Exchange Assurance Company* (b). In *Thomson v. Redman* (c) the Court of Exchequer held that such a plea was not so clearly bad as to be non-issuable; but that case is no authority for saying that such a plea is good, the contrary is rather to be inferred. It may very well be that, as there said, a claim under a policy of insurance may be the subject of mutual credit, when one of the parties has become bankrupt: for mutual credit proceeds on the principle that an account is to be stated of what the assignees can recover, and what is due by the estate. A set-off can be only of mutual debts, not of mutual credits. The difference between mutual credit and set-off is explained in *Forster v. Wilson* (d).

The rejoinder to the replication to the plea of bankruptcy is bad in substance. There is on the policy a

(a) 5 B. & Ald. 93.

(b) 5 M. & S. 439.

(c) 11 M. & W. 487.

(d) 12 M. & W. 191. 203.

1852. contract to indemnify the owner of the goods against
CASTELLI loss by certain perils. That is the principal contract;
v. and all interest in that was before bankruptcy assigned
BODDINGTON. at the same time with the goods. But it happens that,
quite collaterally to this principal contract, the ship was
bound on a voyage to a market; the consideration for
indemnifying against the perils of the whole voyage was
to be 60s. per cent.; but, in case the voyage was termi-
nated in the *United Kingdom*, the consideration was to
be less by 23s. 9d.; and, of course, in that event, the
underwriters were to return the difference, not to the
purchasers of the goods but to *Castelli* the plaintiff, who
originally paid the premium; or, since he has become
bankrupt, to his assignees. But that right to recover
back the premium is no part of the contract of indem-
nity on which the action is now brought. It is a right to
recover back the money as having been paid on a consi-
deration which has failed: it may be proved by the same
writing as the other contract, but is not the same contract.
In *Willis v. Freeman* (a) a bill of exchange was accepted
by the defendants, payable to the order of the drawer; it
was indorsed by the drawer to the plaintiff after an act
of bankruptcy; and consequently, if the beneficial inter-
est in that bill had been the property of the drawer
before his bankruptcy, so as to make it the property of
his assignees before the indorsement, no interest would
have passed to the plaintiff. It happened, however, that
the bill, which was for 1400*l.*, was accepted by the defend-
ants when they had funds in their hands to the amount of
888*l.* 16*s.* 8*d.* So far the beneficial interest in the bill
belonged to the bankrupt, and vested in the assignees:

(a) 12 *East*, 656.

but for the residue, namely 511*l*. 3*s*. 4*d.*, the bill was an accommodation bill; and the beneficial interest did not belong to the assignees. It was held that the two contracts in the bill of exchange were severable, and that a legal interest passed by the indorsement of the bankrupt drawer to the extent of 511*l*. 3*s*. 4*d.*, for which amount the plaintiff recovered. That is a much stronger instance of dividing two contracts, evidenced by one paper, than the plaintiffs here require. It is clear that justice is with the plaintiff; for the assignees cannot recover, as they had no interest in the goods at the time of the loss. The rejoinder also is bad in form; for the averment in the replication, that the policy was assigned, is argumentatively traversed by the rejoinder, which, if it is good, must be so because the whole policy was not assigned.

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Bramwell, contra. The rejoinder is good in form. The averment that the right to recover the loss was transferred is the material part of the replication: that is not argumentatively traversed. The averment that the right to recover was transferred is quite different from the averment that the policy was assigned; *Gibson v. Overbury* (a). And the rejoinder is good in substance. In order to make a good answer to a plea of bankruptcy of the plaintiff, it is necessary to shew that all possibility of beneficial interest in the chose in action is out of the plaintiff; *D'Arnay v. Chesneau* (b). If any part of the damages to be recovered by an action on the contract would belong to the estate, the assignees must bring the

(a) 7 *M. & W.* 555.(b) 13 *M. & W.* 796.

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action on the contract to recover those; and, as there cannot be two legal owners of one contract at the same time, every action on the contract must be brought in their name. [Lord Campbell C. J. But may there not be two independent contracts written on the same paper? And, if so, may not the assignees of the bankrupt take the beneficial interest in one of them only?] There may be such a case; but here there is one contract to fulfil defendant's part of the policy in consideration that plaintiff promises to fulfil his part. That one contract is to do various things: amongst others, in an event which has happened, to indemnify the plaintiff against loss; and further, in an event which has also happened, to return 23s. 9d. per cent. The pleadings shew that the assignees, if they sued on the contract, assigning breaches on both branches, would recover on both: they would be trustees for the *Fudges* of what was recovered on the breach for not indemnifying; but they would retain for the benefit of the estate what they recovered on the other breach. In *D'Arnay v. Chesneau* (a) Parke B., in delivering the judgment of the Court, says: "They" (the assignees) "would not have been bound to refund all that they had recovered to the equitable assignee of the debt, (their cestui que trust), which is the proper criterion, as it appears to us, whether they would have the right to sue or not; this principle being established by the cases of *Carpenter v. Marnell* (b), *Scott v. Surman* (c), *Parnham v. Hurst* (d)."

As to the plea of set-off. There is no authority

(a) 13 M. & W. 809.

(b) 3 Bos. & Pul. 40.

(c) *Willes*, 400.

(d) 8 M. & W. 743.

against such a plea to an action on a policy; but it must be admitted that the general opinion of the Profession has been against it.

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Watson was heard in reply.

LORD CAMPBELL C. J. I think the plaintiff is entitled to judgment on both demurrers. A set-off cannot be pleaded to an action for unliquidated damages; and this, which is an action for a partial loss under a policy of insurance, is an action for unliquidated damages. Mr. *Bramwell* admits that such is now the general opinion of the Profession: and such has been the general opinion ever since I knew anything of it.

As to the other demurrer: the plea is bankruptcy of the plaintiff before action, which is *primâ facie* a good plea. The replication is, that, before the bankruptcy, the plaintiff assigned over to the Messrs. *Fudge* the goods insured, and all right to sue for indemnity, under the policy, in the event of those goods being wholly or partially lost. That is a good replication; for, if uncontradicted, it shews that, at the time of the bankruptcy, the bankrupt had no beneficial interest in this contract. What is the rejoinder? The defendant relies on the stipulation in the policy that, in the event of the goods being landed in the *United Kingdom*, the premium shall be less than what has been paid. He says, that has happened; that the plaintiff before his bankruptcy was entitled to recover back the difference in the premium; and that his right to do so was not transferred to Messrs. *Fudge*. Let it be conceded to him that it was not transferred; that it remained in the plaintiff till his bankruptcy; and that it is now vested in his assignees.

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How does that shew that any interest in the contract for indemnity on which this action is brought passed to the assignees? It seems to me that the two contracts are easily severed. By the policy the underwriters were in one event to receive a large premium, in another a less one. As soon as the goods were landed in the *United Kingdom*, an action accrued to the plaintiff to recover back the difference between the less premium and that which he had paid. But that was not an action on the policy. The plaintiff's right might be evidenced by the policy: but, as the goods were landed short of the destination for which the premium had been paid, there was a partial failure of consideration; and then the law raises a promise to pay. The right to sue on that promise passed to the assignees, but its doing so did not make the right to sue on the contract of indemnity pass to them.

COLERIDGE J. I am of the same opinion. As to the set-off, it is unnecessary to say more than that it is clearly bad. On the other point, I think it may be conceded to Mr. *Bramwell* that, where there are two interests inseparably connected, the right to sue upon both must pass to the assignees, if the right to sue upon either passes. But the present case is not of that nature; for the interests are quite distinct. I think that the right to have the premium returned is one thing which may have passed to the assignees; and that the right to indemnity on which this action is brought is a separate interest which did not pass.

WIGHTMAN J. It appears that, before the bankruptcy, the interest in the goods insured was transferred to

Messrs. *Fudge*; and that the right to sue on the contract of indemnity against loss, contained in the policy, was also transferred to them, as far as such a chose in action can be assigned. Then a loss happens; and Messrs. *Fudge* seek to recover on the contract of indemnity for that loss: but by the rules of law they cannot sue in their own name. The action is brought in the name of the bankrupt: and it is for indemnity. By no possibility could the estate of the bankrupt have any interest in that indemnity, which is the only thing in question in the action. But it is said that there was an interest in the policy of insurance on which the assignees might bring an action and recover the excess of premium for the benefit of the estate; and reliance is placed on *D'Arnay v. Chesneau* (a). But I think the present case is distinguishable. In *D'Arnay v. Chesneau* (a) the chose in action was assigned as a security; it was not certain therefore but that the assignees might have an interest in the surplus; and that possible interest was an interest in the very thing sought to be recovered in the action. Here the assignees cannot by any possibility have an interest in the contract of indemnity, which was transferred to Messrs. *Fudge*, and on which the action is brought.

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ERLE J. The set-off is bad; for it is clear that this is an action for unliquidated damages. As to the other point, without impeachment of the principle contended for by Mr. *Bramwell*, which is I think correct, it seems to me that the premium to be returned might be recovered by the assignees in an action for money had and

(a) 13 M. & W. 796.

1852. received: and I think it is thus severable from the contract for breach of which this action is brought.

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Judgment for plaintiff.

Friday,
November 12th.

HENRY BOLCKOW and JOHN VAUGHAN *against*
The HERNE BAY PIER COMPANY.

By stat. 6 & 7
W. 4. c. cxii.
a pier com-
pany were
authorized to
borrow
30,000*l*.
on mortgage
of the under-
taking; or, if
they thought
fit, on bonds
made in such
manner and
payable at such
time as they
thought fit.
And the act
provided that
all persons,
owners of any
such securities
either by way
of mortgage or
bond, should
be "equally
entitled to a
claim or lien
on the rents,
rates, tolls, and
profits," "with-
out any prefer-
ence by reason
of the priority
of date of any such securities or on any other account whatsoever." Debt, on a bond under the seal of the Company. The condition, which was set out on oyer, recited the above enactment, and was for the payment of money on a day certain. On demurrer:

DEBT. Five counts on five bonds, under the seal of defendants. The defendants craved oyer of the bonds and their conditions; and they were set out. They were all in the same form. The following is a copy of one of the bonds.

"Herne Bay Pier Company

"No. 50.

Bond 100*l*.

Know all Men that the *Herne Bay Pier Company* are held and firmly bound to *Henry Bolckow* and *John Vaughan*, of" &c., "their executors, administrators and assigns, in the penal sum of Two hundred pounds of lawful money of *Great Britain*, to be paid to the said *Henry Bolckow* and *John Vaughan*, their certain attorney, executors, administrators or assigns: for which payment, well and truly to be made, the said *Herne Bay Pier Company* do hereby bind themselves and their successors firmly by these presents, sealed with the common seal of the said *Herne Bay Pier Company* this 1st *March* 1848."

of date of any such securities or on any other account whatsoever." Debt, on a bond under the seal of the Company. The condition, which was set out on oyer, recited the above enactment, and was for the payment of money on a day certain. On demurrer:

Held; that an action lay on such a bond; and plaintiff was entitled to judgment.

Quære. Whether the effect of the clause forbidding a preference might not be to restrain the issuing of execution on that judgment.

The condition was as follows: "Whereas, in and by an Act of Parliament" &c. (6 & 7 W. 4. c. cxii.) (a), "entitled" &c., "it was, among other things, enacted that, if the said Company should think it expedient to borrow the sum of 30,000*l.*, or any part thereof, by bond or bonds under their common seal, it should be lawful for them so to do; and the money secured by such bond or bonds should be made payable in such manner and at such time or times and at such legal or less rate of interest as the said Company should think proper; and the rents, rates, tolls and profits which should from time to time arise in respect of the said undertaking should be a security for the money so to be borrowed as aforesaid, with interest, to the person or persons who should from time to time be entitled to such securities and the principal money and interest thereby secured: and all persons to whom any such securities, either by way of mortgage, as therein mentioned, or bond, should be given or transferred, or in whom they should become so vested, should be equally entitled to a claim or lien on the said rents, rates, tolls and profits in proportion to the respective sums mentioned thereby to be secured, and without any preference by reason of the priority of date of any such securities or on any other account whatsoever. And

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Pier Company.

(a) Local and personal public. "For altering, amending, and enlarging the powers and provisions of an Act for making and maintaining a pier or jetty and other works at *Herne Bay* in the parish of *Herne* in the county of *Kent*; and for giving additional powers to the *Herne Bay Pier Company*." See sect. 9 in the argument, post, p. 76. Sect. 11 directs payment of the interest of money borrowed on mortgage or bond in preference to dividends; and, in case of non-payment of interest for thirty days after demand, empowers two justices to appoint a receiver of the rents, rates, tolls and profits, to the use of the persons to whom the interest is due; "but in case the power aforesaid shall not be resorted to the interest so due and unpaid as aforesaid may be sued for and recovered, with costs, by action of debt in any of His Majesty's Courts of record at Westminster."

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whereas the said Company think it expedient to borrow part of the sum of 30,000*l.* by bond or bonds under their common seal and pursuant to the said Act of Parliament, and, in exercise and execution of the power and authority to them thereby given, they have agreed to borrow the sum of 100*l.* part thereof from the said *Henry Bolckow* and *John Vaughan*: Now the condition of the above obligation is such, that, if the above bounden *Herne Bay Pier Company* do and shall well and truly pay or cause to be paid unto the said *Henry Bolckow* and *John Vaughan*, their executors, administrators or assigns, at the office for the time being of the said *Herne Bay Pier Company*, the said sum of one hundred pounds of lawful money of *Great Britain* on the 1st *March* 1851, "and shall well and truly pay interest upon and for the same at and after the rate of five pounds for one hundred pounds for a year, by even and equal half yearly payments on the first day of *September* and the first day of *March* in each and every year, without any deduction or abatement whatsoever except property or income tax, then and in such case the above written bond or obligation shall be void; but otherwise the same shall be and remain in full force and virtue."

Demurrer. Joinder.

Willes, for the defendants. The question turns on the construction of stat. 6 & 7 *W.4. c. cxii.* Power is given by the statute to borrow 30,000*l.* on mortgage; and then, by sect. 9, it is enacted, "that if the said Company shall think it expedient to borrow the said sum of 30,000*l.* or any part thereof by bond or bonds under their common seal, it shall be lawful for them so to do, and the money secured by such bond or bonds shall be made payable in such manner and at such time or times, and at such

legal or less rate of interest, as the said Company shall think proper, and the rents, rates, tolls, and profits which shall from time to time arise in respect of the said undertaking shall be a security for the money so to be borrowed as aforesaid, with interest, to the person or persons who shall from time to time be entitled to such securities and the principal money and interest thereby secured; and all persons to whom any such securities either by way of mortgage or bond shall be given or transferred, or in whom they shall become vested, shall be equally entitled to a claim or lien on the said rents, rates, tolls, and profits, in proportion to the respective sums mentioned thereby to be secured, and without any preference by reason of the priority of date of any of such securities or on any other account whatsoever." The question is, whether an action at law is the proper remedy for enforcing a bond granted under this section. It is decided that no action at law lies on a mortgage under such an act; *Pontet v. The Basingstoke Canal Company* (a). Nor can the mortgagee maintain ejectment; *Doe dem. Myatt v. The St. Helen's Railway Company* (b). If the creditor, on such a bond, obtains judgment, he must be allowed to issue execution by *elegit* if he will; and thus he may seize the lands of the Company; which a mortgagee cannot do. To permit that would be to defeat that part of the section which enacts that all the mortgage and bond creditors shall be equally entitled to a lien on the rents &c. without any preference on any account whatsoever. [Lord Campbell C. J. It struck me, on reading the paper book, that these words might have effect in restraining the execution to be issued on

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(a) 3 *New Ca.* 433.(b) 2 *Q. B.* 364.

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the judgment when obtained, rather than in barring the action.] There is extreme difficulty in giving them any such effect, or in saying that the statute permits the plaintiff to obtain a judgment which is to be fruitless. The effect of a similar enactment was much discussed in equity in *Russell v. The East Anglian Railway Company (a)*. The result is that these words do not give an equitable lien; and if they do not bar the judgment they seem inoperative. *Hart v. Eastern Union Railway Company (b)* was not on a similar act: that was a railway company carrying on a trade as carriers. This is a pier company not carrying on a trade.

Joseph Addison, contra. The plaintiff is at all events entitled to judgment; for the bond is given to secure interest; and by sect. 11 interest may be recovered by a summary proceeding, or in an action of debt. But the action lies even for the principal debt; *Hart v. Eastern Union Railway Company (b)*. What the effect of the enactment may be on the execution is not now a question before the Court.

Willes, in reply. Sect. 11 applies only when the interest has been in arrear thirty days, and after demand; which is not averred on this record. The special provisions there given for recovering the interest rather fortify the argument that an action at law was not intended to be given for the principal.

LORD CAMPBELL C. J. All that we are now called on

(a) 3 Macn. & G. 125.

(b) 7 Exch. 246. Affirmed in Exchequer Chamber, Trinity term, 1852.
(Not yet reported on error.)

to determine is, whether an action lies on these bonds. And I think there is no sufficient reason for holding that it does not. Sect. 9 in express terms authorizes the Company to make bonds payable at such time as they shall think proper. And the Company have entered into the bonds on which the action is brought, which are made payable on a day certain. *Primâ facie* therefore an action lies; and the onus is cast on the defendants to shew something which prevents the action. Mr. *Willes* relies on the latter words of the ninth section, which enacts that the bondholders and mortgagees shall not have any preference one over the other. At present, all that it is necessary to decide is, whether these words bar the action. I think they have not that effect: what effect they have must be considered when the plaintiff seeks to issue execution, or to assign breaches. There has been no authority cited which shews that an action does not lie on a bond subject to such an enactment: and *Hart v. Eastern Union Railway Company (a)* is an authority that it does lie.

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COLERIDGE J. I think that sect. 9 is less obscure than sect. 11: and I confine my judgment entirely to the former section. (His Lordship then read sect. 9 as set out *antè* pp. 76, 77, down to the words "principal money and interest thereby secured.") Had the enactment stopped here, and a bond had been given in the same form as those declared upon, making the money payable on a day certain, no one would doubt that an action would lie in the same manner as on any ordinary bond. The onus therefore is cast on the defendant to shew that, either by express words, or by

(a) 7 *Exch.* 246.

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necessary implication, this right of action is by the subsequent part of the act taken away. It certainly is not taken away by express words; and I think it is not taken away by implication. The clause enacts that the mortgagees and bondholders shall be equally entitled to a lien, and without any preference one over the other. Certainly this is an enactment which it is very difficult to construe, so as to give it effect. It is said that, if a judgment is obtained by the plaintiff, he may, by issuing execution, obtain a preference over the other bondholders in direct contravention of this enactment. I do not think that follows as a necessary consequence from giving the plaintiff judgment. The words may have an effect given them to restrain the execution: but I do not think they are sufficient to prevent the action, which is the only point now before us.

WIGHTMAN J. I agree that the construction of the act is very difficult: but I see nothing in sect. 9 to prevent the plaintiff from suing on such a bond as this. The Company have, in exercise of the power given in that section, thought proper to execute a common money bond. Therefore an action lies, unless we can find some words to prohibit it. I find none. The enactment giving a lien and prohibiting a preference may have such an effect that the plaintiff will be under a disability to obtain the fruits of his judgment, at least by *elegit*; but there is nothing to prevent his obtaining judgment.

ERLE J. concurred.

Judgment for plaintiff.

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ROBERT JAMES EDWARDS *against* JOSEPH LOWNDES, Clerk of the Local Board of Health for the Parish of BURSLEM. Monday,
November 15th.

CASE against the Local Board of Health for the parish of *Burslem*, sued by their clerk (a). By stat. 6 G. 4. c. cxxxi. commissioners are appointed as trustees to carry out the purposes of the Act. By sect. 91 it is directed

Declaration, reciting that, after the passing of stat. 6 G. 4. c. cxxxi. (b), and before the passing of "The

that, after paying the expenses of obtaining the Act, the remainder of the money in the hands of the trustees "shall be applied at the discretion of the said trustees" in payment of various things, amongst others, "in paying the salary to the organist of *B. church*, and in reducing, paying off and discharging the several principal sums of money and interest" borrowed on mortgage by virtue of the Act. By a provisional order of the General Board of Health (confirmed by stat. 13 & 14 *Vict.* c. 108.) the powers and duties of the trustees were vested in the Local Board of Health for *B.*

In an action on the case by the organist of *B. church* against the Local Board of Health, for a breach of duty in not paying his salary, alleging that they had sufficient funds for the purpose, it appeared at the trial that the Board had funds applicable to the payment of the salary, though the mortgage debt not yet paid exceeded the cash balance in hand.

Held: that the Board and the organist stood in the relation of trustee and cestui que trust; and that, in the absence of a specific appropriation of a part of the fund to the plaintiff, no action at law lay: the remedy being in equity.

(a) Stat. 11 & 12 *Vict.* c. 63. s. 138.

(b) Local and Personal, Public. "For regulating the markets in the town of *Burslem* in the county of *Stafford*, and for lighting, regulating the police, and watching the said town of *Burslem*, and the vills of *Longport*, *Cobridge*, *Sneyd Green* and parts adjacent, in the parish of *Burslem*." It creates commissioners for the purpose of carrying out the act, and vests in them, by sect. 22, as trustees, certain property for a market; and, by sect. 32, gives power to levy tolls and rates; and, by sect. 83, authorizes them to borrow money on mortgage of the tolls and rates.

Sect. 91 enacts: "That out of the first moneys which shall be raised or received by virtue of this Act, the said trustees shall in the first place pay and discharge all the costs, charges, and expenses relative to the procuring and passing of this Act, or so much and such part or parts thereof as the

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1852. Public Health Act, 1848" (11 & 12 *Vict. c. 63*), plaintiff
 EDWARDS was organist of *Burslem* church at a yearly salary of 30*l.*,
 v. payable annually on 29th *September*: that the salary was
 LOWNDES. duly paid by the trustees under stat. 6 *G. 4. c. cxxxi.*
 until 29th *September* 1849: and that the salary due on
 29th *September* 1850 was paid by the Local Board of
 Health for the parish of *Burslem*. The declaration then
 set forth a provisional order of the General Board of
 Health for the application of "The Public Health Act,
 1848," to part of the parish of *Burslem* (a). Aver-
 ment, that this order was confirmed by "The Public
 Health Supplemental Act 1850 (No. 3)" (13 & 14
Vict. c. 108. s. 1. and schedule). That by it, amongst
 other things, it was ordered that the Local Board
 of Health, to be elected as therein prescribed, were

said trustees shall order and direct, with legal interest for such parts thereof as shall have been advanced for that purpose, and the remainder thereof shall be applied at the discretion of the said trustees, in payment of the rents and fines due and to become due to the lord of the manor for the time being in respect of the said market house and the waste lands in the possession of the said trustees, and in the purchase of such messuages, lands, tenements, or hereditaments, as shall be necessary for the purposes aforesaid, and in keeping the said town hall and market house in repair, and providing the necessary conveniences for the said market, and otherwise exercising the several purposes of this Act as to the said market, and in paying the salary to the organist of *Burslem* church, and in reducing, paying off and discharging the several principal sums of money and interest which now are owing, or which shall be borrowed upon any mortgage or mortgages, and in redeeming any annuities to be granted by virtue of this act; and the same shall in the next place be applied for or towards such general improvements in the said parish of *Burslem*, or for establishing, promoting, or assisting any public works, institutions, or establishments there, as the said trustees assembled at any meeting, to be held in pursuance of, and according to the directions of this act shall think proper; and if any surplus shall then remain, such surplus shall be applied in aid and diminution of the police rates hereinafter directed to be raised."

(a) See stat. 11 & 12 *Vict. c. 63. s. 10.*

to be the trustees and commissioners for executing such parts of stat. 6 *G.* 4. *c.* cxxxi. as were not to be repealed: and that certain parts of that act (not material to the present question) were to be repealed. The declaration then proceeded to aver that, after the election of the Local Board of Health, a year's salary became due to plaintiff, on 29th *September* 1851: that funds applicable to and sufficient for the payment of that salary were and still are in the hands of the Local Board of Health, out of which it was their duty to pay plaintiff his salary. Breach: non-payment.

Pleas. 1. Not guilty. 2. Denial that plaintiff was organist. 3. A traverse of the allegation of the provisional order. 4. A traverse of the allegation that funds applicable to and sufficient for the payment were in the hands of the Local Board of Health. On which four traverses issues were joined. 5. That the Local Board never determined to pay the money in their hands to plaintiff; and that, in the reasonable exercise of their discretion, they determined not to pay it to plaintiff, but to apply it to other purposes to which it was applicable: verification. Replication: *De Injuriâ*. Issue thereon.

At the trial, before *Cresswell J.*, at the last *Stafford* Summer Assizes, the appointment of the plaintiff as organist, and the provisional order, were proved. The material evidence on the fourth and fifth issues consisted of two documents. First: the audited account of the Local Board of Health for the year ending *September* 25th 1851; by which it appeared that, at the commencement of that year, the Board had a cash balance in hand of 120*l.* 14*s.* 5*d.*, and that the mortgage debts, contracted under the Act, then amounted to

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7240*l.* 0*s.* 0*d.*: and that, at the end of the year, after defraying the expenses of the year, and reducing the mortgage debts to 7140*l.* 0*s.* 0*d.*, they had a cash balance of 219*l.* 13*s.* 5*d.* Secondly: a letter, signed by the defendant as clerk, and addressed to the plaintiff, in the following terms:

“*Burslem*, 22*d.* October, 1851.

“ Sir,

The Organist's salary.

“ I am directed by the *Burslem* Local Board of Health to inform you that a special meeting has been this day held for the purpose of considering your application for the payment of 30*l.* 0*s.* 0*d.* for a year's salary, as organist of the parish church; when it was determined to resist the demand.”

It was suggested, for the plaintiff, that the Board were actuated by motives arising from local factions: and that the evidence did not shew a bonâ fide application of the funds to other purposes. The learned Judge expressed his opinion to be that there were funds applicable to the payment; but that a legal duty, such as was declared upon, was not proved; and also that the above letter proved the substance of the fifth plea. He directed a verdict for the defendant on the first and fifth issues, and for the plaintiff on the others; and reserved leave to move to enter a general verdict for plaintiff with 25*l.* damages.

Whateley, in this term, obtained a rule nisi accordingly.

J. Gray and *P. McMahon* now shewed cause (a). It appeared by the account put in evidence that a

(a) Before Lord Campbell C. J., Coleridge, Wightman and Erie Js.

mortgage debt of more than 7,000*l.* remained unpaid; and that that debt greatly exceeded the funds in the hands of the Local Board of Health: these funds were as applicable to the payment of that debt as to the payment of the organist's salary. The substance of the 5th plea is proved by the letter in evidence. [Lord Campbell C. J. If there was a legal duty imposed on the Local Board of Health to pay the salary, such that an action at law would lie for a breach of that duty, they could not evade performance of it in that manner. The question is, whether the remedy is at law or in equity.] No action lies at law. The effect of stat. 6 G. 4. c. cxxxi. s. 91. is to render the Commissioners (whose duties are now transferred to the Local Board of Health) trustees of a fund which, in their discretion, they are to apply to a variety of purposes. If they have not bonâ fide exercised their discretion, it is a breach of trust, for which they may be made responsible in equity. But no action lies at law for a breach of trust; *Bartlett v. Dimond* (a), *Pardoe v. Price* (b). [Coleridge J. Do you carry the argument so far as to say that, if every demand except one was discharged, and the Local Board of Health had in their hands ample funds to discharge that one, applicable to no other purpose, still an action at law would not lie?] In the case supposed, no action would lie, unless it could be proved that the defendants had expressly promised to pay the fund to the plaintiff. Where there is a fund in the hands of a trustee, which in equity belongs to the cestui que trust, so that the only trust unperformed is one to pay over the money, if the trustee does in fact promise his cestui que trust to pay it, assumpsit, for money had and received or on an account stated, may be maintained; *Roper v. Hol-*

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(a) 14 M. & W. 49.

(b) 16 M. & W. 451.

1852. *land (a)*: but no promise to perform even such a trust is implied by law. The distinction is explained in the judgment in *Pardoe v. Price (b)*. There is one case apparently not in accordance with that principle; *Cane v. Chapman (c)*: but that case, if it can be supported, must depend upon the special terms of the Act in that case. The salary in the present case is not made chargeable on the property belonging to the Local Board of Health: yet, if judgment goes against them, that property may be seized in execution. That is a reason why an action does not lie; *Addison v. Mayor of Preston (d)*. [Lord Campbell C. J. In a Scotch Appeal, *Duncan v. Findlater (e)*, the House of Lords determined that the funds of a public body were not liable for the misconduct of those managing it. If there is a breach of a legal duty here, the members of the Board are personally liable in this action; but the property belonging to the Board could not be taken in execution.]

Whitely and Whitmore, contra. Cane v. Chapman (b) cannot in any way be distinguished from the present case. If there is any difference, the present case is stronger; for, after the Board paid the salary in 1850, and induced the plaintiff to continue his services for a fresh year, they were rather debtors to him than trustees for him.

Cur. adv. vult.

LORD CAMPBELL C. J., on a subsequent day in this term (November 25), delivered the judgment of the Court.

L. J. & C. 20.

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This was an action on the case against the Local Board of Health of the parish of *Burslem* in the county of *Stafford*, who were sued, in the name of their clerk, for an alleged breach of duty, in not paying to the plaintiff an arrear of salary which was due to him as organist of *Burslem* Church. The defendant pleaded Not guilty, and some traverses; and also a special plea, to which the plaintiff replied *De injuria*. Upon the trial, the jury found a verdict for the plaintiff upon the traverses; and for the defendant on Not guilty and the issue upon the replication to the special plea; with liberty reserved for the plaintiff to move to enter the verdict for him upon the two issues which were so found for the defendant.

It appeared that, in 1825, an Act was passed (6 G. 4. c. cxxxi.) for regulating the markets and the police of *Burslem*, and lighting and watching the town and some villages and places adjacent: and by that Act certain persons were appointed trustees for carrying into effect various of the purposes contemplated by the Act, and with power to raise and receive money by virtue of the Act; out of which they were, by sect. 91, required, in the first place, to pay the costs of procuring the Act, and to apply the remainder at their discretion, in payment of the rents and fines due to the lord of the manor in respect of the market house and other property vested in the trustees, and in the purchase of such lands &c. as should be necessary for the purposes mentioned in the Act, and in keeping the town hall and market house in repair, and in providing the necessary conveniences for the market, and otherwise executing the purposes of the Act as to the market, and in paying the salary to the organist of *Burslem* Church, and in

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1852. reducing and paying off the principal and interest of money borrowed on mortgage, and redeeming annuities granted under the Act; and, in the next place, to apply such money to the general improvement of *Burslem*; and any surplus to be applied in aid of the police rate.

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The plaintiff was appointed organist after the passing of the Act, and was paid his salary of 30*l.* a year by the trustees up to the 29th of *September* 1849. In 1850, by a provisional order of the General Board of Health, confirmed by stat. 13 & 14 *Vict. c.* 108., all the powers, authorities and duties of the trustees were transferred to and vested in the Local Board of Health of the parish of *Burslem*; and the salary of the plaintiff as organist, due on the 29th of *September* 1850, was paid by the Local Board of Health; but they refused to pay the plaintiff his salary which became due on the 29th of *September* 1851, having, at the time of their refusal, more money in their hands applicable to the payment of the plaintiff's salary, and to the other purposes mentioned in the 91st section of stat. 6 *G. 4. c.* cxxxi., than was sufficient to pay the plaintiff's salary; but no part of which had been appropriated by the Board, either to the payment of the plaintiff's salary, or to any of the other purposes specified in the 91st section of the Act. It appeared, however, that there were debts due on mortgage to a much greater amount than the money in the hands of the Board.

The question discussed before us was: Whether, under these circumstances, an action on the case was maintainable against the Local Board of Health for a breach of duty in not paying the plaintiff his salary? And, as the principle involved in the question is one of very general application, we wished to look at the authorities that

were cited, before giving our judgment; though we did not entertain any doubt upon it.

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It may be taken as settled that, where the parties stand to each other in the relation of trustee and cestui que trust, and the trustee is under no other legal liability than that which arises from that relation, no action at law for money had and received can be maintained against him, though he has money in his hands which under the terms of the trust he ought to pay over to the cestui que trust, but which he still holds in the character of trustee only. It is unnecessary to refer upon this proposition to other authorities than that of the well considered judgment delivered by Baron Rolfe in *Pardoe v. Price* (a). If, indeed, the trustee, by appropriating a sum as payable to the cestui que trust, or otherwise, admits that he holds it to be paid to the cestui que trust, and for his use, the character of the relation between the parties is changed; and the trustee does not hold it as a trustee properly so called, but as a receiver for the plaintiff's use, who may maintain an action at law for money had and received, founded upon the appropriation to his use and the liability thence arising. There are many cases that are founded upon this principle, from *Allen v. Impett* (b) to *Roper v. Holland* (c); and these have reference to earlier decisions.

In the present case, the Board of Health were trustees for the persons who were interested in the distribution of the funds which were received by the Board under the act; and the plaintiff and the board were in the relation to each other of cestui que trust and trustee. The Board had made no appropriation of any part of

(a) 16 M. & W. 451.

(b) 8 Tunn. 263.

(c) 3 A. & E. 99.

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the money in their hands as held for him ; and there is no doubt that he could not maintain an action against it for money had and received. It was said, indeed, that by having paid the plaintiff once a contract might be inferred which would be legally binding. But the payment was made in execution of the trust, and not upon contract by the Board, even if such an argument could be urged in such an action as the present. As it appears to us to be clear that no action for money had and received, or for work and labour, could be maintained by the plaintiff against the Board of Health, is an action on the case maintainable by the plaintiff, founded on an alleged breach of duty by the Board in not paying him his salary when they had funds in their hands applicable to the payment, and which they might have so applied, but did not? The plaintiff relied upon the case of *Cane v. Chapman* (a). In that case, the commissioners appointed under an Act for paving and lighting the town of *Harwich* were authorized to raise money by grant of annuities, which were to be paid by the commissioners out of the money to arise from the rates which they were authorized to levy for carrying the Act into execution : there was a clause in the Act, by which it was enacted that all money which the commissioners should receive should be applied from time to time in defraying the expenses, first of obtaining the Act, and afterwards of carrying the same into execution, and for no other use or purpose. The declaration stated the grant of an annuity to the plaintiff, pursuant to the Act ; that it was in arrear ; that the commissioners had in their hands money arising from the rates more than sufficient to pay

(a) 5 A. & E. 647.

the plaintiff, and were requested to pay him; and that it thereupon became their duty to pay him; but that the commissioners, not regarding their duty, did not pay. The defendants denied that it was their duty; upon which there was a demurrer. It was objected that the action would not lie: but the Court held that it would, on the ground that the commissioners were not personally liable; that they were executing a public trust, and were liable to an action for breach of duty if they had funds with which they might have paid the plaintiff, but refused and neglected to do so. It may be observed that this appears to be the first and, as far as we are aware, the only case in which it has been decided that such an action is maintainable under such circumstances. It was not alleged that there were no other annuitants who might have equal claims with the plaintiff, or that the fund in hand was applicable, exclusively, to the plaintiff's debt. It was for the plaintiff, who charged the defendants with a breach of duty, to shew affirmatively that there had been such a breach; and Lord *Denman* expresses much doubt whether the action was maintainable in that form. It is not easy to reconcile that case with the principles upon which the legal remedies against trustees, whether for public or private purposes, have been regulated: and we are not disposed to consider it an authority in any case in which the circumstances are not precisely similar.

In the present case, by the terms of the 91st section of stat. 6 G. 4. c. cxxxi., the money received by the trustees is to be applied *at their discretion* to various specified purposes; of which paying the organist's salary was one; as was also the reducing and paying off money

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1852. owing upon mortgage: and it did appear that, independently of the purposes mentioned in the Act, there was money due and payable upon mortgage to a greater amount than the money in the hands of the Local Board of Health; and to the payment of which the fund in their hands was just as applicable as to the payment of the plaintiff's claim. This distinguishes the present case from that of *Cane v. Chapman* (a): and, on general principle, we think that an action on the case for breach of duty is not maintainable by a cestui que trust against his trustee, where the only breach complained of is the non-payment of money which the trustee holds as such, to be paid by him to the cestui que trust, but which he has not specifically appropriated to that purpose. The proper remedy in such a case would be in equity; or, if there is any remedy at law, it might under some circumstances be by mandamus; but not by action.

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We are therefore of opinion that the rule in this case should be discharged.

Rule discharged.

(a) 5 A. & E. 647.

Re The Inhabitants of Brainlee 28d 9 M^c 3

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The QUEEN *against* The Inhabitants of the Liberty
of SAFFRON HILL, HATTON GARDEN and ELY
RENTS.

Wednesday,
November 17th.

ON appeal against the order of a metropolitan police magistrate, adjudging that the settlement of *Mary Gillott*, a lunatic pauper, was in the Liberty of *Saffron Hill, Hatton Garden and Ely Rents*, in *Middlesex*, and ordering the officers of the poor of that Liberty to pay certain sums in respect of her maintenance to the officers of the poor of the parish of *St. Mary Islington*, in the same county, the Sessions confirmed the order, subject to the opinion of this Court on the following case.

On the hearing of the appeal, an objection was made to the admissibility of evidence tendered by the appellants; which objection arose as follows. The appellants, by way of answer to the *prima facie* case of the respondents, relied on a settlement alleged to have been acquired by renting a tenement in the parish of *St. Marylebone*: and it appeared, on the evidence of the pauper's husband, that the tenement in question had been rented by him under an agreement in writing, which was drawn up by a clerk of Mr. *Ponsford*, and read over by him to the witness, and which had remained with Mr. *Ponsford*, his landlord. A witness was then

On the trial of an appeal, the Quarter Sessions decided that there was not sufficient proof of search for a written agreement by *P.*, to let a tenement, to make secondary evidence of its contents admissible, and rejected the evidence, subject to a case: by which it appeared that the document was traced to the custody of *P.*, and that a witness deposed that he asked *P.* if there was such an agreement; and *P.* answered, "I cannot say for a certainty;" and that *P.* then sent his clerk and witness to *P.*'s office to search, which

they did; and the document was not found. *P.* was not called as a witness.

Held: 1. that the decision on a point of this kind might be reviewed; but that the onus was on the party objecting to the decision: 2. that it was not necessary to call *P.* if there was proof of the search having been made in the proper place of deposit; but that it did not appear that the Court below was wrong in deciding that it was not proved that the office was the proper place of deposit.

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called who gave the following evidence: "I went last week to Mr. *Ponsford*, and asked him whether there was any agreement between himself and Mr. *Gillot* respecting the house in question. He said: 'I cannot say for a certainty; I will search.' He then told his clerk to search: and the clerk and I searched together amongst the papers of the office, and also amongst day books and ledgers; and we could find no agreement."

The Court of Quarter Sessions was of opinion that the proof of search for the agreement was insufficient to warrant the reception of secondary evidence of its contents, and that Mr. *Ponsford* ought to have been called as a witness.

If the Court should be of opinion that the view of the Sessions was incorrect, the order appealed against and the order of Sessions are to be severally quashed: otherwise they are to be confirmed.

Huddleston, in support of the order of Sessions. There was evidence on which the Sessions were justified in finding that there was not sufficient search. This Court will not review the finding of the Court below on a question of fact. [Lord *Campbell* C. J. The question on a preliminary enquiry of this sort is, at *Nisi prius*, decided by the judge. The finding of the Quarter Sessions on such a question is not conclusive.] The Sessions came to the proper conclusion: there is nothing to shew that Mr. *Ponsford*'s office was the proper place in which to search for this document. *Regina v. Kenilworth* (a) may be cited, as proving that what Mr. *Ponsford* said was evidence: but, supposing what he said to be

admissible, it does not prove enough. The appellants did not do all they could; it was necessary, to make out their case, that they should call Mr. *Ponsford*; *Rex v. Castleton (a)*. [Lord Campbell C. J. That proposition cannot be sustained in all its generality. If there had been proof that Mr. *Ponsford*'s office, where the search was made, was the place of deposit where it might reasonably have been expected that the document, if extant, would be found, so that its not being there would raise a presumption that it had been destroyed, the secondary evidence would have been admissible: and there would have been no occasion to call Mr. *Ponsford*. But there seems to be here no evidence that the office was the probable place in which the agreement would be kept.]

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Pashley, contra. It does not appear that in *Rex v. Stourbridge (b)* there was any statement as to the place of deposit. [Lord Campbell C. J. In that case the search was made in the place in which, if all persons did their duty, the document, if extant, would be. No presumption arises that Mr. *Ponsford*'s private papers would be kept in his office.] The direction given by him to his clerk to search there is tantamount to an assertion that the document, if it existed, would be found there. Such an assertion is admissible evidence on a preliminary enquiry of this kind; *Regina v. Kenilworth (c)*, *Rex v. Morton (d)*. [Lord Campbell C. J. referred to *Rex v. Denio (e)*.]

LORD CAMPBELL C. J. I think the order must be

(a) 6 T. R. 236.

(b) 8 B. & C. 96.

(c) 7 Q. B. 642.

(d) 4 M. & S. 48.

(e) 7 B. & C. 620.

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confirmed, on the ground that the case does not disclose enough to enable us to say that the Court of Quarter Sessions was wrong in deciding that there was not evidence of search for the document sufficient to make secondary evidence of its contents admissible. It appears that there was proof that an agreement in writing by Mr. *Ponsford*, to let the tenement, had once existed; and it was traced to his custody. Then we have the evidence of the witness set forth. No question arises in this case as to whether the declarations of a person, to whose custody a document is traced, made at the time when he is asked for the document, are admissible evidence to shew what the proper place of deposit is, so as to obviate the necessity of calling further evidence on that point: for Mr. *Ponsford* does not say, "The document, if it is in my custody, is in my office; go and search there; and, if you do not find it there, I have not got it." It is perfectly consistent with all that is stated that the proper place of deposit for such a document as this was in Mr. *Ponsford*'s house; and that the house was not searched. If there had been proof aliundè that the office was the proper place of deposit, I should have thought the evidence of search sufficient, though Mr. *Ponsford* was not called as a witness to prove that he himself had searched. But there is a total absence of all such evidence; and I think that it will be consistent with every decision, if we say that enough does not appear to satisfy us that the Court of Quarter Sessions was wrong.

COLERIDGE J. I wish, in giving my judgment, to adopt the very words of my Lord, and say "that enough does not appear to satisfy us that the Court of Quarter

Sessions was wrong;" for, though a decision on a preliminary question of this kind is subject to be reviewed by us, we ought to be very cautious in reversing the decision on such a point. The onus of proving that secondary evidence is admissible is cast on the party seeking to use it. That raises a preliminary enquiry, both as to the facts and as to the conclusion of law on these facts. Now it is quite possible that the evidence may present itself to the Court below in such a way as to justify a decision as to the fact very different from what would appear to be the legitimate conclusion from the evidence when written down. For instance, to take an extreme case, there may be evidence which on paper would seem irresistible; and yet the demeanour of the witnesses may be such as to justify a decision the other way. It would be very difficult to do justice in reviewing a decision of that nature. On the other hand, the case might be such that it would be very easy to review the decision; as, for instance, if it was that a document was to be presumed to be destroyed on the ground that it was a useless document, when, perhaps, it clearly was not useless. For these reasons, I think that, on such an enquiry as this, the question is rather whether we can say that the court below was wrong, than whether it was right. Now in the present case I can see nothing to satisfy us either that the document was useless, so that it might be presumed to be destroyed, without search; or that the search was made in the proper place of deposit. We need not determine which we shall follow of the somewhat conflicting decisions, in *Rex v. Denio* (a)

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and *Regina v. Kenilworth (a)*, as to the admissibility of the declarations of the person, in whose custody the document should be, respecting the place of deposit: for the statements of Mr. *Ponsford* were not rejected; they were received, but did not prove enough. It does not appear from the statement in the case where Mr. *Ponsford* was when he was asked for the document. It may very well be that he was at his house, and sent his clerk to search at the office, upon the chance of the document being there, although it would not in the ordinary course of things be kept there. But all I say is that, on the statement in this case, the Court below may have been right.

WIGHTMAN J. The Court below had to determine, whether there had been a sufficient search. I agree that, unless we are satisfied that the decision they came to was wrong, we must not overrule it. It is unnecessary to enquire whether Mr. *Ponsford*'s declarations as to the proper place of deposit ought to have been received; for he made none of any importance. He does not appear to have known whether the document did exist or ever had existed. He does not say where it would be if it existed. It does not appear where he was when he sent to the office, his doing which is relied upon as an assertion that the document ought to be there: and there is no evidence, nor was there any presumption, that his office was the place where he was likely to keep his private papers.

ERLE J. It is difficult to lay down any definite rule of law as to what constitutes a search for a document

(a) 7 Q. B. 642.

sufficient to warrant the admission of secondary evidence of its contents. In *Phillips on Evidence* (a) it is said: "Cases must very much depend upon their particular circumstances, especially on the importance of the instrument, or the usage or practice which may exist respecting the custody of such documents." In the present case it is enough to say that the facts stated in the case are not sufficient to shew that the Court below was wrong.

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Order confirmed.

(a) *Phill. & Arn. On the Law of Evidence*, Vol. II. 281.

RUST against NOTTIDGE.

Friday,
November 19th.

ASSUMPSIT. The declaration stated that heretofore, to wit on &c., by an agreement then made between

Declaration in
assumpsit
stated that,
by agreement

between defendant and plaintiff, after reciting that defendant had requested plaintiff to enter into defendant's employment in a manufacture, and that for that purpose plaintiff had agreed to leave his then employment on 1st July then next, "it was witnessed that the said parties thereto did mutually agree as follows: "first, plaintiff agreed that he would serve defendant in such business for seven years at a salary of 100*l*. per annum, subject to the cesser of the salary and the determination of the agreement as after mentioned. Secondly, defendant agreed that he would, from and after 1st July, and during the continuance of the agreement, pay to plaintiff the salary by monthly payments; "and, if the said defendant should from any cause whatsoever give up the said business, or not require" plaintiff's "services, then that" defendant "would use his best endeavours to procure for the said plaintiff employment in some similar business, and for which he should receive a salary of not less than 100*l*. per annum; or, in case" defendant "should be unable to do so, then the said defendant would pay to the said plaintiff the yearly sum of 100*l*. during the residue of the said term of seven years." That plaintiff had always performed and fulfilled all things on his part &c.

1st breach, That defendant, during the continuance of the term, refused to suffer plaintiff to continue in his employ, and then wrongfully discharged plaintiff therefrom without reasonable or probable cause.

2d breach, That, although &c., (discharge as before), defendant did not use his best or any endeavours to procure, nor did he procure, plaintiff employment in some similar business for which he should receive a salary of not less than 100*l*. a year, but had wholly failed to find plaintiff such employment.

Held, that the 2d breach was well assigned: for that, by the agreement, it was not open to defendant, under the circumstances, to choose between using his best endeavours to find plaintiff the situation, and simply paying him 100*l*. per annum: but that he was bound to use his best endeavours &c. in the first instance, and could resort to the mere payment of salary only upon the failure of these endeavours.

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That it was not necessary for plaintiff to aver a request by him to defendant to use his best endeavours &c.

That the general averment of performance, on general demurrer, amounted to an allegation that plaintiff was ready and willing to accept such situation.

That the language of the breach implied that a reasonable time for procuring such situation had elapsed.

Plea, as to 2d breach, that, at the time when plaintiff was discharged as in the said breach mentioned, defendant was, "and thence hitherto has been, wholly unable to procure for the plaintiff any such employment as in the said agreement mentioned."

Held, on demurrer, that the plea was bad in substance, inasmuch as it raised an immaterial issue; it being consistent with the plea that defendant had not used his best endeavours at all.

defendant of the one part and plaintiff of the other, after reciting that defendant was about to enter into business as a manufacturer of chemicals in the city of *London* or its environs, and that he had applied to and requested plaintiff to enter into his employment as a manufacturer and assistant in the said business, which plaintiff had consented to do, and for that purpose plaintiff had agreed to leave his then employment on 1st *July* then next, and for the term and under the conditions thereafter mentioned: it was witnessed that the said parties thereto did mutually agree with each other as follows: firstly, the plaintiff agreed that he would faithfully and properly serve defendant as such manufacturer and assistant in such business as aforesaid for the full term of seven years, to be computed from 1st of *July* then next, at a clear salary of 100*l.* per annum, subject to the cesser of the salary and the determination of the agreement as thereafter mentioned; and would, at all times during the continuance of the said term, to the best of his ability and with industry and zeal, effectually obey all the lawful directions of defendant, and punctually attend at his place of business, and during such hours as the urgency or convenience of business should require, and should not (except in case of illness or with the consent of defendant) absent himself from his service or employment, or be employed by any other person without the previous consent of defendant: and, secondly, defendant agreed that he would, from and after the 1st *July* next, and during the continuance of the agreement, pay to plaintiff a clear salary of 100*l.* per annum, by monthly

payments, the first payment to be made on 1st *August* then next; and, if defendant should, from any cause whatsoever, give up the said business, or not require his services, then that he would use his best endeavours to procure for plaintiff employment in some similar business, and for which he should receive a salary of not less than 100*l.* per annum; or, in case he should be unable to do so, then defendant would pay to plaintiff the yearly sum of 100*l.* during the residue of the said term of seven years. And it was thereby further agreed, between the said parties to the said agreement, that, in case plaintiff should not at all times during the said term faithfully and properly serve defendant as thereinbefore provided, and if he should not, to the best of his ability and zeal, effectually obey all his lawful directions and punctually attend at his office in the manner thereinbefore required, or absent himself from his employment (except in case of illness), or be employed by any other person without consent of defendant, or should be guilty of any dishonesty or intemperance, whereby defendant should be prejudiced, or in case he should not, in all other respects, do every thing which was therein before agreed to be done by him according to the true intent of the said agreement, then, and as often as the same should occur, it should be lawful for defendant to cancel and put an end to the said agreement, and the same should accordingly be deemed to be cancelled, on the defendant giving to plaintiff a notice in writing of such his intention, or leaving the same at his last known place of abode. Averment of mutual promises to perform the agreement. That, although plaintiff, confiding &c., hath always, from the time of making the agreement, hitherto well and truly performed &c. all things on his part &c., and

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did afterwards, to wit on 19th *May* 1851, leave his then employment, and did enter into the employment of defendant, as such manufacturer and assistant in such business as aforesaid, and on the terms of the said agreement, and continued in such employ of defendant in the capacity aforesaid, and on the terms of the said agreement, for a long space of time, to wit until &c., and did, at all times during the said time, faithfully and properly serve the defendant, and did, to the best of his ability and zeal, effectually obey all the lawful directions of defendant, and did punctually attend at his office in the manner by the said agreement required, and did not absent himself from the employment of defendant (except in case of illness), and was not employed by any other person, and was not guilty of any dishonesty or intemperance, and did in all other respects act as a faithful assistant and manufacturer to defendant in his said business, according to the true intent &c.; and although plaintiff was, on the day and year last aforesaid, and hath always since been, ready and willing, and then offered, to remain and continue in the employ of defendant in the capacity aforesaid, and on the terms aforesaid: yet defendant did not nor would continue plaintiff in his, defendant's, employ until the expiration of the said seven years, to wit from &c., but, on the contrary thereof, during the continuance of the said term, to wit on &c., refused to suffer plaintiff to continue in his the defendant's said employ, and then wrongfully discharged plaintiff therefrom, without any reasonable or probable cause whatsoever; and hath thence hitherto wholly neglected and refused to retain or continue plaintiff in his, defendant's, employ for the remainder of the said term. That, although defendant, during

the continuance of the said term, to wit on &c., did not nor would continue plaintiff in his employ for the residue of the said term, but discharged him therefrom as aforesaid, yet defendant did not use his best, or any, endeavour to procure, nor did he procure, plaintiff employment in some similar business, and for which he should receive a salary of not less than 100*l.* a year, but has wholly failed to find plaintiff such employment. That, by means of the premises, plaintiff hath lost and been deprived of all the wages, profits and advantages which he otherwise might and would have derived from being so employed as aforesaid, and which defendant hath wholly refused to pay or allow to plaintiff; and plaintiff hath been and is wholly unemployed. To the damage &c.

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Plea 6. As to the alleged breach of promise in the declaration lastly above assigned, that, at the time when plaintiff was discharged as in the said alleged breach mentioned, defendant "was, and thence hitherto has been, wholly unable to procure for the plaintiff any such employment as in the said agreement mentioned."

Demurrer. Joinder.

Udall, for the plaintiff. The defendant proposes to impeach the declaration. The declaration complains of defendant not using his best endeavours to procure plaintiff a situation, without negating the non-payment of 100*l.* But it was not necessary to negative that. The contract is not alternative. The defendant is not to choose whether he will use his best endeavours to procure the plaintiff a situation of not less than 100*l.* a year or simply pay him that amount of salary: he is bound to take the former course first; and it is only upon his failing in that,

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that he is to take the latter. Nor was it necessary to aver the plaintiff's readiness to accept a situation : if the defendant had used his best endeavours to procure one, and had succeeded, or, on failing, had paid the 100*l.*, he would have fulfilled the contract, whether the plaintiff was ready to accept or not. It will be further objected that the declaration should have averred the lapse of a reasonable time. That was not necessary : if the plaintiff had brought his action immediately upon being discharged, it would have been open to the defendant to plead that he had used his best endeavours ; he might have done his best, though he had done nothing : and, if the plaintiff had traversed that plea, the length of time would have been one of the elements for the consideration of the jury in determining whether the plaintiff had or had not done his best under the circumstances. The defendant's next objection is that the discharge without reasonable cause is not of itself a breach of the contract ; and that the defendant does not engage to use his best endeavours in the event of such a discharge. But he contracts to do so if, for any cause whatever, he gives up the business or does not require the defendant's services. The declaration must be looked at as on general demurrer : and, this being so, the general allegation of performance by the plaintiff is enough to shew the fulfilment of all conditions precedent, negative as well as positive ; *Oglethorp v. Hyde (a)*.

Then, the plea offers no answer. The defendant, instead of alleging that he had used his best endeavours, alleges, by way, not of traverse, but of confession and avoidance, that he was unable to procure the plaintiff a

(a) *Cro. EHz.* 232.

situation : that raises an immaterial issue ; for such inability might possibly have arisen from the very fact of his not having used his best endeavours, as he was bound to do.

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Bovill, contra. The defendant is entitled to judgment upon both breaches. This is, in effect, a contract by an employer to pay a party 100*l.* a year for a certain time, whether he employ such party during the whole of that time or not. The second breach is bad ; for it is framed as if the contract of the defendant were simply to employ plaintiff, or use his best endeavours to procure plaintiff a place. The defendant is not bound to employ the plaintiff ; though, if he do not, he is bound to procure the plaintiff a salary of 100*l.* a year in one of two different ways, either by procuring him a situation worth 100*l.* or paying that sum annually. The contract, in short, is to pay the defendant 100*l.* a year under any circumstances : it is similar to that in *Aspdin v. Austin* (a) and to that in *Dunn v. Sayles* (b). [Lord Campbell C. J. Then the declaration would be good, if there were one good breach for non-payment.] Yes. The action should have been brought for the non-payment of 100*l.* a year. [Lord Campbell C. J. Is not the payment of 100*l.* a year by the defendant contingent upon the failure of his best endeavours ? It might be much better for the plaintiff to obtain a situation in which he would gain instruction and connections than to have the 100*l.* a year for doing nothing. Coleridge J. Does the necessity for such payment arise till such failure ? Erle J. Wherever there is a promise on one side to serve, and a

(a) 5 Q. B. 671.

(b) 5 Q. B. 685.

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promise on the other to pay for such service, there is an implied contract that the employer is to retain for the time specified: if he do not, the amount of compensation is a question for a jury. The point is, I think, now before the House of Lords on error from the Exchequer Chamber in *Elderton v. Emmens* (a).] In that case *Parke* B., in giving the judgment of the Exchequer Chamber, refers to *Aspden v. Austin* (b) and *Dunn v. Sayles* (c), approving of the doctrine laid down in those cases, and distinguishing them from the case then before the Court, on the ground that in both of them the contract arose upon separate covenants by the plaintiff and by the defendant, and not from a mutual agreement, as in *Elderton v. Emmens* (a), where the word "agreed," he observed, was to be construed as the word of both parties; and he referred to *Pordage v. Cole* (d). [Erle J. In the present case the agreement recited has the words "did mutually agree with each other as follows." But the mutual agreement is that each will perform a distinct stipulation: it is not a case where, from the two agreeing for a single thing, the correlative duties arise. It might as well be said that, from the defendant undertaking to use his best endeavours to procure the plaintiff a situation, a contract by the plaintiff to accept a situation is to be inferred. [Lord Campbell C. J. You say that one set of covenants is the consideration for the other.] Yes. [Lord Campbell C. J. Then is not the contract in some sort a contract by the defendant to employ?

(a) 6 Com. B. 160, in Exch. Ch., reversing the judgment of the Court of C. P. in *Elderton v. Emmens*, 4 Com. B. 479.

(b) 5 Q. B. 671.

(c) 5 Q. B. 685.

(d) 1 Saund. 319.

He engages to pay; but what he pays for is the service of the plaintiff.] How can the contract be an absolute contract to employ, even by implication, when it contains an express provision for the case of non-employment? [*Erle J.* The agreement recites that defendant had requested plaintiff to leave his then situation.] The agreement discloses nothing more than a contract to pay 100*l.* a year, in one way or other, for seven years: and there are different modes of performance specified. There is nothing unreasonable in such a contract, looking at the facts of this case. Upon a contract somewhat similar, in an *Anonymous* (a) case, it was held that a declaration which did not negative the performance of both alternatives was bad after verdict. But, even if the defendant be bound to use his best endeavours to procure the plaintiff a situation before electing to simply pay 100*l.* a year, he is bound to do so only upon two separate contingencies; first, if he give up the business; secondly, if he have no occasion for the defendant's services; but not, as the declaration assumes, in the case of a wrongful dismissal. Further, a request by the plaintiff that the defendant would use his best endeavours to procure the situation, or at any rate readiness and willingness on the part of the plaintiff to accept it, should have been averred; and, even assuming that such readiness and willingness may be collected from the declaration, still it would be necessary to aver that defendant had notice of such readiness and willingness; *Doogood v. Rose* (b). Also, the plaintiff should have averred the lapse of reasonable time; *Stavart v. Eastwood* (c). It is quite consistent with the declaration that the defendant may

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(a) *Hardr.* 320.(b) 9 *Com. B.* 132.(c) 11 *M. & W.* 197.

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have been prevented from using his best endeavours by illness, insanity, or other causes. [*Coleridge J.* The question then would be, had he used his best endeavours under the circumstances?]

Then, the plea answers the declaration. If the averment that plaintiff had not used his best endeavours involves an assertion that a reasonable time for his doing so had elapsed, then the defendant's assertion that he had been unable to procure a situation involves the assertion that he had used such endeavours as the actual lapse of time had made possible.

Udall, in reply. Had the plaintiff traversed the plea, he would have been bound to shew ability on the part of the defendant; whereas it was incumbent on the defendant to shew that he had used his best endeavours. This shews that the plea cannot be taken as an answer to the breach. (He was then stopped by the Court.)

LORD CAMPBELL C. J. I give no opinion as to whether there is or is not an undertaking by the defendant to employ the plaintiff, though I am disposed to think that there is. But I consider that, as regards the defendant not using his best endeavours, the breach is well assigned. There is an absolute undertaking by the defendant to use such endeavours, and, if he fail in them, then, and then only, to pay the salary of 100*l.* a year. It is as clearly so, as if there had been added, after the words "should be unable to do so," the words "after using his best endeavours." The contract is thus clearly not optional: he has not a choice whether he will use his best endeavours or pay the salary: the second course is not open to him till the first has been tried,

and has proved unsuccessful. And it is clear that these endeavours are to be made by the defendant *mero motu*; no request by the plaintiff is necessary. The contract is absolute, and not merely conditional upon a request being made. We cannot sanction any of the subtle objections which have been made to the declaration. We agree with the plaintiff's counsel that here, as on general demurrer, the general averment of performance in the declaration is sufficient. As to the want of an averment that the plaintiff was ready and willing, I think that is covered by the general averment. Nor is there any necessity to aver the lapse of a reasonable time: the breach implies that. The plea would clearly have been bad on special demurrer, and would, I think, have been set aside by a Judge at chambers, as being tricky. But I think it also bad on general demurrer; for it tenders an issue totally different from that which would have been tried if there had been a simple denial of the breach in the words of the agreement. Judgment must therefore be for the plaintiff.

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COLERIDGE J. I am of the same opinion. There can be no doubt as to the meaning of the agreement. It contains three heads: first, the defendant is to pay the salary of 100*l*. during the continuance of the service; secondly, if he does not require the service, he is to use his best endeavours to procure a situation; thirdly, if he fails to do that, he is to pay 100*l*. a year. We are not at liberty to say that this is not the meaning. Mr. *Bovill* would invert the meaning of the words, and make the payment of the 100*l*. per annum the primary step. That is not the natural sense of the contract. As my Lord has pointed out, a situation with the salary might

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be a much better thing than the salary without the situation. The using his best endeavours is clearly the primary step; and that breach is therefore well assigned. Much of the argument for the defendant has therefore no application, it being clear that the second breach is good. I had more doubt as to the plea; but not a doubt sufficiently strong to induce me to differ from the rest of the Court.

ERLE J. (a). I have no doubt that the plaintiff is entitled to judgment. This is not an alternative contract, but a series of contracts. It is clear that the 100*l.* a year without a situation might be less valuable than a situation of that amount, in which, besides that salary, he would get both instruction and employment: there was therefore abundant reason for wording the contract in these terms. The plea tenders an immaterial issue; it does not follow that, because the defendant was unable to procure a situation, he had used his best endeavours to do so. It might appear that no manufactory of the kind was going on, and yet that the defendant had repudiated all connection with the plaintiff. That state of facts would satisfy the averment in the plea, and yet would not shew that the defendant had used his best endeavours to procure a situation. The plea therefore is wholly beside the legitimate issue.

Judgment for plaintiff.

(a) *Wightman J.* was absent.

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CATCHPOLE *against* The AMBERGATE, NOTTING-
HAM and BOSTON and EASTERN JUNCTION RAIL-
WAY COMPANY.

Friday,
November 19th.

CASE. The first count stated that heretofore, and at the time of the execution of the deed of trans-

Declaration in
case against an
incorporated
railway com-
pany (under

stat. 9 & 10 *Vict. c. civi.*, incorporating the Companies Clauses Consolidation Act, 1845,) stated that, before and at the time of the execution of the deed of transfer after mentioned, *N.* appeared by a book of defendants kept by defendants in pursuance of the provisions of The Company's Clauses Consolidation Act, 1845, called The Register of Shareholders, to be, and then was, lawful owner of 300 shares in the undertaking of defendants; that plaintiff bought the shares of *N.*, and *N.*, by a deed duly stamped, signed, sealed and delivered by him to plaintiff, transferred the shares to plaintiff, subject to the conditions on which *N.* held them at the time of the execution; that the deed was according to the form in Schedule B. to the last mentioned Act; and that plaintiff afterwards caused the same to be delivered to *G.*, the secretary of defendants and their agent in that behalf, to be kept by them, in order that defendants might enter a memorial in The Register of Transfers, and endorse such entry on the deed of transfer; and might on demand deliver a new certificate to plaintiff as purchaser of the shares, according to the provisions of the last mentioned Act. Breach, that defendants did not, nor did *G.* nor any other person on defendants' behalf, enter any memorial &c., or indorse any entry &c., whereby plaintiff had been deprived of his right and title to appear in the books of defendants as holder and proprietor of the shares: whereby, and by reason of *N.* still appearing by The Register of Shareholders to be holder and proprietor of the shares, and of calls having been made by defendants, after the committing &c., upon persons so appearing by the last mentioned book to be holders and proprietors of the said shares, and (among others) upon *N.*, and by reason of the failure of *N.* to pay the calls (plaintiff having received no notice of forfeiture), defendants, to wit by the directors of the Company, did, according to the provisions of the last mentioned Act, declare the shares forfeited; which forfeiture having been afterwards and according to the provisions of the last mentioned Act confirmed at a general meeting of the Company, and the shares so forfeited directed to be sold for the purposes in the last mentioned Act declared, and according to the provisions thereof, the shares so forfeited were afterwards sold by defendants, to wit by the said directors, by public auction: and plaintiff had thereby been deprived of his right to compel defendants to make such entry and indorsement as aforesaid, and to deliver to plaintiff such certificate, and had also been deprived of the shares and all benefit thereof, and all the dividends and other profits, which he might have derived therefrom, and also of the benefit of selling the shares at an increased premium, the shares having, since the committing &c., risen in value.

2d count, stating that plaintiff, at the time of the committing &c., was the lawful holder, and well entitled to, 300 shares in the undertaking of defendants; that defendants, without lawful cause, and in pretended exercise of the powers confirmed by the Company's Clauses Consolidation Act, 1845, wrongfully declared the shares forfeited, and afterwards confirmed such forfeiture, and afterwards sold the shares: whereby plaintiff had been deprived of the said shares and the benefit thereof, &c. (as in 1st count).

Held, on special demurrer:

That both counts disclosed a good cause of action, inasmuch as they shewed a wrongful act of omission by defendants in neglecting to register, and also wrongful acts of commission

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by them in declaring and confirming the forfeiture, and selling the shares; and that such acts were not simply inoperative, but that the declaration disclosed an actual loss to plaintiff, resulting from those acts.

Held, also, that it was not necessary for plaintiff expressly to aver that a reasonable time for registering the shares had elapsed.

fer, and before the committing &c. of the grievances, thereafter mentioned, one *W. L. Nutter* appeared, by a certain book of defendants kept by defendants in pursuance of the provisions of the "Company's Clauses Consolidation Act, 1845," and called the "Register of Shareholders," to be, and then was, the lawful holder and proprietor of divers, to wit 300, shares in the undertaking of defendants, of great value, to wit 2000*l.*, and was lawfully entitled to sell and transfer the same; and, being minded and desirous to sell and transfer the said shares to the plaintiff, heretofore, to wit on &c., agreed with plaintiff to sell and transfer the said shares to him, and then bargained and sold to plaintiff, and plaintiff then bought of *N.*, the same shares, at and for a certain price or sum, to wit 37*l.* 10*s.*: and thereupon, and in pursuance of the said agreement and bargain and sale, to wit on &c. last aforesaid, by a certain deed duly stamped as by law then required, and signed, sealed and delivered by *N.* and the plaintiff respectively, *N.*, in consideration of the sum of 37*l.* 10*s.* to him paid by plaintiff, did transfer the said shares to plaintiff, to hold the same to plaintiff, his executors, administrators and assigns, subject to the several conditions on which *N.* held the same at the time of the execution thereof: and by the said deed plaintiff did agree to take the said shares, subject to the same conditions. Averment, that in the deed the consideration for the transfer was truly stated, and that the deed was in all respects according to the form in Schedule B. to the last mentioned Act of Parliament annexed, or to the like effect. Averment that, after the execution of the deed of transfer in manner aforesaid, to wit on &c., plaintiff caused the same to be delivered to defendants, to wit to one *G.*, then being the secretary of and appointed by de-

defendants, and their agent in that behalf, to be kept by them, and in order that defendants might enter a memorial in a certain book of defendants, kept by defendants in pursuance of the provisions of the last mentioned Act of Parliament, called the "Register of Transfers," and indorse such entry on the said deed of transfer, and might on demand deliver a new certificate to plaintiff as the purchaser of the said shares, according to the provisions of the last mentioned Act of Parliament: and it then became and was the duty of defendants, and they were then required, to wit by plaintiff, to make and indorse such entry as aforesaid. Breach: that defendants did not, nor did the said G. as such secretary as aforesaid, or any other person on the defendants' behalf, enter any memorial in the said book of the defendants called the "Register of Transfers," or indorse any entry on the said deed of transfer, but have hitherto wholly neglected &c. Whereby plaintiff has been deprived of his right and title to appear in the books of defendants as the holder and proprietor of the said shares, and whereby, and by reason of the said N., after such delivery of the said deed of transfer and the committing of the said grievances, still appearing by the said book of defendants called "The Register of Shareholders" to be the holder and proprietor of the said shares, and of divers calls having been made by defendants after the committing of the said grievances upon divers persons so appearing by the last mentioned book to be the holders and proprietors of shares in the said undertaking, and amongst others the said N., and by reason of the failure of the said N. to pay the said calls so made upon him as aforesaid, plaintiff having received no such notice of forfeiture as in the last mentioned Act of Par-

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liament mentioned, defendants, to wit by divers persons then being the directors of the said Company lawfully appointed, whose names are respectively unknown to plaintiff, did, after the committing of the said grievances and according to the provisions of the last mentioned Act of Parliament in that behalf, proceed to declare, and did declare, the said shares so standing in the last mentioned book in the name of the said N., as the holder and proprietor thereof, forfeited: which forfeiture having been afterwards and according to the provisions of the last mentioned Act confirmed at a general meeting of the said Company, and the said shares so forfeited directed to be sold for the purposes in the last mentioned Act declared, and according to the provisions thereof, the said shares so forfeited were afterwards sold by defendants, to wit by the said directors, to wit by public auction, according to the provisions of the last mentioned Act of Parliament. And plaintiff has thereby been deprived of his right to compel defendants to make such entry and indorsement as aforesaid, and to deliver to plaintiff, as the purchaser of the said shares, such certificate; and has also been deprived of the said shares, and all benefit thereof, and all the dividends and other profits which he might and would have derived therefrom, and also the benefit of selling the said shares at an increased premium, the said shares having, since the committing of the said grievances, greatly risen in value, to wit to the amount of 50*l.* per share; and by means of the premises the plaintiff has been, and otherwise is, greatly injured &c.

2d. Count. That, before and at the time of the committing &c., plaintiff was the lawful holder of, and well entitled to, divers, to wit 300, shares in the undertaking of the defendants, of great value, to wit 2000*l.* Never-

theless defendants, well knowing the premises, but contriving &c., heretofore, and whilst plaintiff still continued the lawful holder of and so entitled to the last mentioned shares, and before the commencement of this suit, to wit on &c., wrongfully, improperly and without any lawful cause or excuse, and in pretended exercise of the powers and authorities in that behalf given and conferred by The Companies Clauses Consolidation Act, 1845, to wit by certain persons then being directors of the said Company lawfully appointed &c. (Averment of declaration of forfeiture, confirmation and sale, as in first count). Whereby plaintiff has lost and been deprived, not only of the said shares and the benefit thereof, and all the dividends and other profits which he might and otherwise would have derived therefrom, but also of the profit of selling at an increased premium &c. (as in first count).

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Demurrer, assigning as grounds the points afterwards insisted upon in argument. Joinder in demurrer.

Willes, for the defendants. Both counts of the declaration are bad. As to the first: even supposing a forfeiture to have taken place, it operates nothing; it is simply void, and therefore inflicts no injury upon the plaintiff. The special Act of the Company (*a*) incor-

(*a*) Stat. 9 & 10 Vict. c. clv. (Local and personal, public) "For making a railway from or near the *Ambergate Station* of the *Midland Railway*, through *Nottingham*, to *Spalding* and *Boston*, with branches therefrom, and for enabling the Company to purchase the *Nottingham* and *Grantham* Canals."

By sect. 1 it is enacted, among other things: "That the several Acts of Parliament following, that is to say, 'The Companies Clauses Consolidation Act, 1845,' 'The Lands Clauses Consolidation Act, 1845,' and 'The Railways Clauses Consolidation Act, 1845,' shall be incorporated

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porates the provisions of stat. 8 & 9 *Vict. c. 16.* (*Companies Clauses Consolidation Act, 1845*), sect. 15 of which provides that, until a transfer has been "delivered to the secretary" of the Company in the manner prescribed by sects. 14, 15, the vendor is liable for the calls upon the shares transferred, and the purchaser is not entitled to the profits upon them: his right is not made to depend on the registration. Therefore the plaintiff is not justified in his complaint that he has been deprived of the profits upon the shares. The shares are still the property of the plaintiff. It is as if, *A.* being owner of land, *B.* should take on himself to sell the land to *C.* [*Coleridge J.* The declaration states that defendants have actually sold the shares, and plaintiff has thereby lost the dividends upon them.] The declaration does not shew that the plaintiff has been, by any act of the defendants, deprived of his title to the shares. These shares are merely a right to a certain portion of the profits of the undertaking; the holder's right is not that of a partner in the property of the Company. And such right can be divested only in the mode given by the statutes governing the Company. [*Lord Campbell C. J.* De facto the defendants have declared the shares forfeited.] Such an act amounts, at the most, to mere slander of title. It is much the same case as where a landlord wrongfully assumes that his tenant has been guilty of a breach of covenant which creates a forfeiture of the lease, and lets the estate to a third party; or like the case which occurred

with and form part of this Act, and the provisions of the said several Acts shall be applicable to the purposes of this Act, except so far as the same provisions or any of them are inconsistent with the provisions of this Act, or are hereafter declared not to extend thereto."

in *Owen v. Legh* (a), where the landlord wrongfully seized as a distress, and sold before the five days, growing crops of his tenant; and it was held that no action lay, the sale being simply void. [*Coleridge J.* At all events the defendants refuse to treat the plaintiff as a shareholder.] They cannot effectually do so; they are bound to treat him as a shareholder, inasmuch as he has complied with the provisions of sect. 15, and has delivered the transfer to the secretary. No act of the defendants can affect his claim to be considered as a shareholder. [*Lord Campbell C. J.* Can he have a share of the profits, or vote at the meetings of the shareholders, until he is registered?] He certainly has a right to do so; there might, however, be some difficulty in shewing that right without the evidence afforded by registration. But that is not the ground of his complaint. The alleged forfeiture either deprives him of his shares altogether, or does not affect him at all. He may, therefore, if he succeeds in this action, not only recover the whole value of the shares, but may also proceed against the Company for the amount of the dividends. [*Coleridge J.* At law?] At all events he might have a suit in equity. [*Lord Campbell C. J.* Surely the defendants have, unlawfully, done an act which has injured the plaintiff.] The plaintiff certainly shews no injury in his declaration. The second count does not complain of the injury resulting in respect of difficulty of proof: the first count does not shew that a reasonable time has elapsed for registration.

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Bramwell, contra. Even assuming the forfeiture to be wholly inoperative as regards the plaintiff's title, he

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ought still to succeed in this action. His title is shewn only by the books of the Company; so that in fact the defendants by their wrongful act have destroyed the plaintiff's title deeds, not merely slandered the title. It is admitted that the plaintiff is actually a shareholder. Then, by sect. 29 of stat. 8 & 9 *Vict. c. 16.*, which enables the directors to declare the shares forfeited if the shareholder neglect to pay the call, the plaintiff has actually lost his shares, and that through the wrongful act of the Company. It is true that there are certain formalities requisite, by sect. 33, for rendering the title of the new holder of such forfeited shares not impeachable by reason of any irregularity in the previous proceedings: but the shares are here, *de facto*, forfeited under sect. 29. This is indisputably a grievance to the plaintiff caused by the unlawful act of the defendants, and is properly alleged in the declaration. In *Owen v. Legh (a)* the crops remained on the ground; and nothing was in fact done. It is said that the plaintiff should have alleged that a reasonable time for registration had elapsed. If a reasonable time had not elapsed, the defendants could not have time to make the call and declare the forfeiture (*b*), supposing that they were not bound to register immediately. But it is clear that they are so bound. *Beer v. Beer (c)* shews that the averment of neglect is tantamount to an averment of the lapse of a reasonable time.

Willes, in reply. *Beer v. Beer (c)* is inapplicable. There all that the defendant had to do was to account at once, upon request being made. The register of a number of transfers necessarily requires a reasonable time. [*Coleridge J.* Can the defendants, after making

(a) 3 B. & Ald. 470.

(b) Sec stat. 8 & 9 *Vict. c. 16. s. 29.*

(c) 21 L. J. N. S. C. P. 124.

the call and declaring the shares forfeited, say that they had not reasonable time to register the transfer?] If there is a wrong, it is distinct from the wrong complained of. What the plaintiff complains of is merely that he himself was not registered. As to the second count, sect. 33 gives the buyer a title only after certain steps have been taken, which is not shewn to have occurred here.

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LORD CAMPBELL C. J. I am of opinion that the plaintiff is entitled to judgment upon both counts. The second count shews the plaintiff to be entitled to certain specific ear-marked shares, which have been declared forfeited and sold: surely that is a wrong and an injury. The declaration shews both *injuria* and *damnum*. The defendants have been guilty of a wrongful act of omission in not registering the plaintiff's name in their books, and also of a wrongful act of commission in declaring the shares to be forfeited, and in confirming that forfeiture. It is said that the plaintiff could sustain no injury. But he has been deprived of the ordinary privileges of shareholders; and, contingently, of any profits that might have arisen upon the shares. Those are clearly injuries for which he has a right to bring an action. The acts are not mere non-entities, like the sale of the crops in *Owen v. Legh (a)*. How does it lie in the mouth of the directors to say that their act is void? I think the first count good also. It shews specifically what the transaction was; and a further gravamen, the confirmation of the forfeiture and the sale of the shares.

COLERIDGE J. I am entirely of the same opinion. The defendants, by their own act, have treated the

(a) 3 B. & Ald. 470.

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wrong party as holder of certain shares, and on his supposed default sold the shares. This is clearly a wrongful act by which the plaintiff has been damnified. *Owen v. Leigh* (a) is not in point. There the sale would be simply inoperative. If a man sells a book in my library, without meddling with it, he does me no harm: but, if he takes it away and sells it in market overt, I lose my book. Sect. 33 is very material: it shews that the vendee of the shares may by certain steps acquire evidence of title; and the defendants have done all in their power to complete the title of the vendee here.

ERLE J. (b). I agree that the judgment ought to be for the plaintiff on both counts. There has clearly been a breach of duty on the part of the defendants, and a consequent damage to the plaintiff, by the omission of the defendants to turn the inchoate title of the plaintiff into a complete title, and by their subsequent acts of commission, in confirming the forfeiture and selling the shares. Has then the plaintiff suffered damage by the forfeiture? He clearly has, just as much as a man, who is entitled to have water flow through his land, is injured by a diversion, though he does not want to use the water at the particular time. A registered owner of shares may attend meetings, and has an apparent property. And the Company, though guilty of an unlawful act, may by that act complete a title in a stranger; that is an injury to the right of the owner. Both the first and second counts shew a cause of action. It is clear that no more express allegation of the lapse of a reasonable time is necessary.

Judgment for plaintiff (c).

(a) 3 B. & Ald. 470.

(b) *Wightman J.* was absent.

(c) See *Sayles v. Blane*, 14 Q. B. 205.

The following case may conveniently be inserted here, on account of its connection with the two cases next following.

The QUEEN *against* LEITH, Secretary of 'The [Saturday, January 17th, 1852.]
LONDON and WESTMINSTER STEAM BOAT COM-
PANY.

ON appeal, by *The London and Westminster Steam Boat Company* against the decision of the Trustees By stat. 10 G. 4. c. cxxix. Trustees were empowered, "for the better

lighting and watching the several roads, streets, squares, lanes, alleys, courts, yards, and other public passages and places" under their jurisdiction within a district (part of *Lambeth* parish in *Surrey*), to cause the roads, &c. to be lighted and watched as they should think fit. And, "to defray the expenses of watching, lighting, and otherwise improving the roads, streets, lanes, courts, alleys, and other public passages and places," "and for removing and preventing nuisances, annoyances, and encroachments therein and incidental thereto, and for other the purposes of this Act," the Trustees were authorized to make a rate upon all persons "who do or shall inhabit, hold, use, occupy, possess, or enjoy any messuage or tenement, land, shop, warehouse, or other building, wharf, yard, storehouse, ground, cellar, hereditaments, or premises within any part" of the said district "under the jurisdiction of the said Trustees," according to the annual value.

The appellants, an unincorporated Joint stock company, were proprietors of steam boats plying on the *Thames*: and, for embarking and disembarking passengers, constructed a pier or landing place in the *Thames*, opposite to premises abutting on the *Thames*, which they held by lease of S., and which consisted of the ground floor and cellar, being part of premises called *The Mill*, of which last mentioned premises the remainder was occupied by S. himself. The pier or landing place consisted of barges, moored by anchors in the bed of the river, and connected by wooden bridges with each other, and with a platform resting on an abutment which was bolted into the wall of the premises held of S. by the appellants. Passengers using the pier passed through the appellants' part of the premises, which were used also for a pay office, and contained other rooms, a warehouse for ropes, &c., and the cellar.

The Trustees rated the appellants by the words, "tenement, land, landing place and premises, and the brow or brows, barge or barges, dummy or dummies, lying upon, fixed to or connected with the same tenement, land, landing place or premises, and the easement or easements, anchorage or anchorages, held, used or enjoyed therewith." In the same rate S. was rated for a "Mill and premises" "exclusive of the steam boat pier." On appeal, the Sessions (which had jurisdiction by the Act) the rate was confirmed; and a case was stated for this Court, reserving the question as follows. "If, upon the facts stated, the Court should be of opinion that no rate can be maintained, the judgment of the Court of Quarter Sessions to be reversed. If the Court should be of opinion that the rate can be maintained, irrespective of its amount, the judgment of the Court of Quarter Sessions to be affirmed."

Held: That the rate was good, being substantially made on the land occupied by the appellants, and the other items mentioned being merely accessories, shewing the mode and purpose of such occupation, and adding to its value.

That S. was not rated for the land so occupied by the appellants.

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under stat. 10 G. 4. c. cxxix. (a), confirming a rate made on the appellants, dated 24th April 1850, the Sessions

(a) Local and personal, public. "For watching, lighting, cleansing, and otherwise improving the roads, streets, and other public passages and places within the district left as belonging to the original parish church of Saint Mary Lambeth in the county of Surrey, and the ecclesiastical district called the Waterloo district, in the same parish."

Sect. 1 recites that "many of the roads, streets, ways, lanes, courts, alleys, and other public passages and places within the northern part of the parish of Lambeth, comprising the Lambeth Church and Waterloo districts, are not sufficiently cleansed, watched, or lighted, and are subject to many nuisances, annoyances, and encroachments; and the power of the Trustees for executing a certain Act" (3 G. 4. c. cxii., local and personal, public) "to defray, out of the tolls to arise by virtue of that Act, the expenses or any part of the expenses of watching and lighting the roads from the north side" &c. (describing a district and certain roads) would cease on certain days named; "and it would be of great benefit, safety, and convenience to the owners and inhabitants of houses, buildings, and premises in the said northern part of the said parish of Lambeth, and to the residue of the said parish, and to the public at large, if some provision was made for better and more effectually cleansing, watching, lighting, regulating, and improving the same roads, streets," &c. (as above), "and for removing and preventing nuisances, annoyances, and encroachments therein;" Trustees are then created, with provisions for the election of successors, "for putting this act into execution."

Sect. 19. "And for the better lighting and watching the several roads, streets, squares, lanes, alleys, courts, yards, and other public passages and places under the jurisdiction of the said Trustees within the said districts; be it further enacted, that it shall and may be lawful for the said Trustees to cause the said several roads, streets," &c. (as before), "and other public passages and places under their jurisdiction within the said districts, (or such part or parts thereof only as to them the said Trustees shall seem right,) to be lighted and watched in such manner as they the said Trustees shall think fit, and to exercise all such powers and authorities as shall be necessary for that purpose."

Sect. 20 enacts: "That it shall be lawful for the said Trustees, in case they shall deem it expedient to light the said streets, roads, lanes, passages, and other public places in the said districts with gas," to set up a manufactory of gas, &c.

Sects. 21, 22, 23, contain provisions and restrictions as to the power of the Trustees to break up or disturb "the pavement or ground in any road, street, way, lane, or other public passage or place," for laying down pipes.

affirmed the decision of the Trustees, subject to the opinion of this Court on the following case.

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Sect. 66. " And in order to defray the expenses of watching, lighting, and otherwise improving the roads, streets, lanes, courts, alleys, and other public passages and places under the jurisdiction of the said Trustees within the said districts, and for removing and preventing nuisances, annoyances, and encroachments therein and incidental thereto, and for other the purposes of this act; be it further enacted, that the said Trustees shall and they are hereby required and authorized, twice in every year, if they shall deem it necessary, or oftener, if they think proper, to make and sign an equal pound rate or assessment upon all and every person or persons who do or shall *inhabit, hold, use, occupy, possess, or enjoy any messuage or tenement, land, shop, warehouse, or other building, wharf, yard, storehouse, ground, cellar, hereditaments, or premises within any part of the said districts*, or either of them, under the jurisdiction of the said Trustees, or upon such part or parts thereof only as to them the said Trustees shall seem equitable and right, according to the annual value of such respective premises, so as such rates or assessments do not exceed in the whole, in any one year, the sum of 1s. 6d. in the pound on the yearly value of such messuages or tenements, land," &c. (as before) "and premises; and which said rate, and the money to be from time to time raised thereby, shall be applied for and towards defraying the expenses of carrying this act into execution."

Sect. 70 enacts: "That the said Trustees shall and may, if they think proper, at any meeting, amend any such rate or assessment, rates or assessments, after the same shall have been made and signed, by inserting the name of any person who ought to have been but who has not been rated or assessed, or by striking out the name of any person who hath been but ought not to have been rated or assessed, by altering the sum or sums charged in any such rate or assessment on any person or persons, or in any other manner in which the said Trustees shall think proper for making the same a just and equal rate or assessment, without wholly setting aside or quashing the same."

Sect. 72 enacts: "That where the yearly rent or value of any house, tenement, hereditament, or premises within the said districts shall not exceed 20l.," and in other specified cases, it shall be lawful for the Trustees, "if they shall think fit, to compound with the landlord or landlords, owner or owners, lessee or lesses," for payment of the rate at such reduced yearly rental as the Trustees shall think reasonable, so as the house, &c. be not rated at less than half or more than three fourths of the rack rent; and the

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The appellants are an unincorporated joint stock company, constituted by a deed of partnership, and having

landlord, owner or lessee refusing to enter into such composition shall be deemed and taken to be occupier, and shall pay the rates.

Sect. 74 enacts : " That to prevent disputes touching the designation of the landlord or owner intended to be made liable by this act, the person or persons receiving, claiming, or being entitled to the rents of every such house, tenement, hereditament, or premises, immediately payable by the tenants or occupiers thereof respectively, shall be deemed and taken to be the landlord or owner of the same for the purposes of this act, and to be the person and persons required to enter into such composition as aforesaid."

Sect. 77 gives power to levy the rates by warrant of justices and distress.

Sect. 81 gives an action at law for the rates.

Sect. 102 enacts : " That if any person or persons shall think himself, herself, or themselves aggrieved by any rate or rates, assessment or assessments, made by virtue of this act, or by any rule, order, or regulation, judgment or determination of the said Trustees, or by any matter or thing done or directed to be done or committed by the said Trustees under or in pursuance or execution of this act, such person or persons may appeal to the said Trustees at any meeting or meetings to be holden by them within three calendar months next after the cause of complaint" &c., giving ten days' notice ; " and in case any such person or persons shall not be satisfied with the determination of the said Trustees, or in case no judgment or determination shall be given within two calendar months next after notice of the complaint to them respectively given," or in case of a party thinking himself aggrieved by an order of justices, " he, she, or they may appeal to some general or quarter sessions of the peace to be holden for the said county within six calendar months next after such determination" or cause of complaint, first giving ten days' notice, &c. : and the justices at the sessions " shall hear and determine the causes and matters of such appeal in a summary way, and award such costs" &c. ; the determination to be final and conclusive.

Sect. 103 enacts : " That upon all appeals from any rate or assessment made in pursuance of this act, the Court of general or quarter sessions of the peace shall and such Court is hereby authorized and required (in all cases where they shall see just cause to give relief) to amend such rate or assessment, either by inserting therein or striking out the name or names of any person or persons, or by altering the sum or sums therein charged on any person or persons, or in any other manner which the said Court shall think necessary for giving such relief, and without quashing or

their offices in *Villiers Street, Strand*, in the county of *Middlesex*, and duly registered pursuant to stat. 7 & 8 *Vict. c. 110.*, by the style or name of *The London & Westminster Steam Boat Company*. The respondents are the Trustees appointed and acting under stat. 10 *G. 4. c. cxxix.*

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On 2d *March* 1837, the appellants became tenants to one *John Simmonds*, under a lease for a term of ten years, of certain premises abutting on the river *Thames* near *Westminster Bridge*, and consisting of the ground floor, with the cellars thereunder, being part of certain premises called *The Mill*, situate in the ecclesiastical district called the *Waterloo* district in the parish of *Lambeth*, then in the occupation of the said *John Simmonds*. By the lease, *Simmonds* agreed to pay all the rates and taxes. The appellants are the proprietors and owners of certain steam boats, which take and convey passengers for hire to and from *London Bridge* at the city of *London* end or side of the said bridge to *Westminster Bridge* at the *Surrey* end or side of *Westminster Bridge*.

In the year 1840, the appellants, for the convenience of embarking and debarking passengers travelling by their steam boats, constructed a pier or landing place in the river *Thames*, immediately opposite to the said premises so held by them under *Simmonds*, and communicating with the said premises in the manner hereafter mentioned. The said pier or landing place consisted of

wholly setting aside such rate or assessment: provided always, that if the said Court shall be of opinion that it is necessary, for the purpose of giving relief to the person or persons appealing, that the rate or assessment should be wholly quashed, then the said Court may quash the same, and order a new one to be made."

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three floating barges or dummies, boarded over, and kept in their places by iron chain cables, fastened to iron anchors sunk or imbedded in the bed of the river. The said barges were connected by three wooden bridges, of the length of fifty feet, forty feet, and thirty feet, respectively; the first bridge at the land end being fastened to a platform, which platform rested upon an abutment, which abutment is attached and made fast to the wall of the said premises by iron bolts let into the same wall. The first mentioned bridge rests on the platform at the land end, and on the first barge at the water end. The second and third bridges rest at both ends upon the barges; and both bridges and barges rise and fall with the tide. Since the construction of this pier or landing place, passengers desiring to be conveyed by the appellants' boats descend by a flight of stone stairs from the *Westminster Bridge* road through a doorway made in the said premises, by which they enter upon the said ground floor. Here a penny is taken from each passenger by a servant of the appellants; and the passengers then pass, through the doorway opening upon the river, over the said platform, bridges and barges, to the appellants' boats. Passengers landing from the Company's boats at this station, after passing over the barges and bridges, enter the said premises through the said doorway opening upon the river, and, after passing over the said ground floor, depart by the said doorway opening to the said flight of stone stairs, and ascend to the *Westminster Bridge* road. The said ground floor, rented by the appellants from *Simmonds*, is divided into a small office or pay-place for the money-collector, an office for the superintendent, two other small rooms, and a warehouse at the back, towards the *Belvedere Road*, in which the said

appellants keep ropes &c. for their boats. Under the said ground floor is a cellar, in which coals are kept by the appellants. No person resides upon the premises so rented by the appellants: but the said premises, as well as the said pier and landing place, are in the exclusive use of the appellants for the purposes described. One of the shareholders or copartners in the said *London & Westminster Steam Boat Company* resides in the *Belvedere Road* within the said *Waterloo* district.

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In *February* 1847, a new agreement of tenancy was entered into between the appellants and *Simmonds*; under which last mentioned agreement the appellants have since paid *Simmonds* a rent of 300*l.* per annum for the said premises; *Simmonds*, by the said agreement, undertakes to pay all rates and taxes for the said premises.

All the premises remained in the state above described from 1840 to 1848. Although various rates were made by the Trustees during that interval, the appellants were not rated until *June* 1848. In the years 1848 and 1849, respectively, the respondents rated the appellants in respect of the said premises: but the said rates respectively were objected to and abandoned. The rate now in question was made by the Trustees on 24th *April* 1850. The following is a copy of the rate, and also of so much of the schedule annexed to the said rate as related to the rating and assessment of the appellants, and the rating and assessment of *Simmonds*.

"We, whose names are hereunder set and subscribed, being eleven of the Trustees for putting into execution an Act" &c. (10 *G.* 4. c. cxxix.), "and being present at a meeting of the Trustees aforesaid, duly held by virtue of the said Act on *Wednesday* the 24th day of *April*, 1850, at" &c., "in pursuance of due and regular notice

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given of the said meeting, and concurring in the rate or assessment hereunder written, Do hereby make a pound rate or assessment of *5d.* in the pound, to take date and commence on the 24th day of *April* instant, upon all and every the person or persons respectively named in the schedule hereunto annexed, being respectively persons inhabiting, occupying, holding and enjoying the several tenements, messuages, lands, shops, warehouses, or other buildings, wharfs, yards, storehouses, piers, ground, cellars, hereditaments, or premises, mentioned in the said schedule, within the said districts, according to the annual value of such respective premises; or being landlords, owners or lessees of houses, tenements, hereditaments and premises in the said schedule also mentioned as within the said districts, and having compounded for and thereby or otherwise become subject or liable to the payment of the said rate or assessment: the same being the first rate or assessment made in the present year, in order to defray the expenses of lighting or otherwise improving the roads, streets, lanes, courts, alleys, and other public passages and places under the jurisdiction of the said Trustees within the said districts, and for removing and preventing nuisances, annoyances and encroachments therein and incidental thereto, and for other the purposes of the said Act. In witness whereof" &c. (signature of the chairman and ten other Trustees).

Number of Assessment.	Number of House.	Name of Tenant or Occupier.	Landlord or Landlord, Owner or Owners.	Description of Property rated.	Assessment.	Value compounded at.	Rate, of Fivepence in the pound.	Number of Paid List.	Empty, Excused, or Irrecoverable.	Remarks.
843 a	Bridge Street.	The London and West- minster Steam Boat Com- pany.		Tenement, land, landing place and pre- mises, and the brow or brows, barge or barges, dummy or dummies, lying upon, fixed to or connected with the same tenement, land, landing place or premises, and the easement or easements, anchorage or anchorage, held, used or en- joyed therewith.	£ 150		£ s. d. 3 3 6			Amended by Trus- tees. See Minute Book, 17 July, 1850.
623		John Sim- monds and Fredk. Boyce Morton.		Mill and premises.	£ 490		£10			Exclusive of the Steam Boat Pier.

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On the 4th of *September* 1850, *The London & Westminster Steam Boat Company*, thinking themselves aggrieved by the last mentioned rate, appealed to the Trustees under sect. 102 of stat. 10 G. 4. c. cxxix. The grounds of such appeal were as follows.

1. That the property, in respect of which the assessment is made, is not rateable property within the said Act 10 G. 4. c. cxxix.

2. That the said rate does not, on the face of it, shew in respect of what property the Company is rated.

3. That the said property has already been rated to the said rate, and cannot be rated twice over.

The Trustees determined against this appeal, on 4th *September* 1850. And *The London & Westminster Steam Boat Company* thereupon appealed to the Quarter Sessions, adding, to the grounds of appeal submitted to the Trustees, the two following.

1. That part of the property is not rateable property ; and that, the sum assessed being entire, there is no means of ascertaining how much is assessed on the rateable, and how much on the non-rateable, property ; and the whole is therefore void.

2. That the said rate or assessment is not made or assessed upon any person or persons, within the meaning of the said Act 10 G. 4. c. cxxix.

“If, upon the facts stated, the Court should be of opinion that no rate can be maintained, the judgment of the Court of Quarter Sessions to be reversed. If the Court should be of opinion that the rate can be maintained, irrespective of its amount, the judgment of the Court of Quarter Sessions to be affirmed.”

G. Hayes and *Bagley*, in support of the order of

Sessions. As no point of form is raised, the general question is as to the rateability of the land upon which this pier is constructed. The words of stat. 10 G. 4. c. cxxix. s. 66. are very general: "messuage or tenement, land, shop, warehouse, or other building, wharf, yard, storehouse, ground, cellar, hereditaments, or premises within any part of the said districts." Whether, as to some of the items mentioned in the rate, the appellants were entitled to use the land as they have done, is not material to the question of rate; *Rex v. Bell* (a). [Lord Campbell C. J. For the present argument, we must assume the occupation to be rightful.] Land is, indeed, occupied by the whole of the structure: it is like the case of a railway constructed over an arch, where there is an occupation of the land between the abutments, though it partakes of the nature of an easement. [Lord Campbell C. J. The intention here appears to be to rate the pier.] The subject of the rate is in fact that part of the pier which is land. If that be rateable, the rate does not become bad by the mention of the appurtenances, even supposing these not to be rateable in themselves. They contribute to the value of that which is rated. In *Rex v. Barnes* (b) the proprietors of a bridge over the *Thames* were rated for land occupied by them on one side of the river; and it was considered that the value of the land arose, in part, from tolls taken elsewhere for passing over the bridge from the land: it was not made an objection there that the rate was thus, in effect, partly in respect of the bridge. In *Regina v. Hammersmith*

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(a) 7 T. R. 598.

(b) 1 B. & Ad. 113.

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Bridge Company (a) the Company were rated for the bridge and its appurtenances: and the Court said: "The bridge itself is the direct source of the rateable value." [*Wightman* J. Suppose the barges were only moored, and the appellants occupied nothing more, not having any land used as an access to the barges. Lord *Campbell* C. J. Take the case of a floating bath, moored in the middle of the river, accessible by boats only.] In these cases there would legally be an occupation of the land where the barge or bark was moored; and the occupiers would be rateable: the present case, however, does not require this. The occupiers of a floating bridge attached to each side of a river would in like manner be liable. No objection can be founded on the fact, if it were so, that another party, who is not occupier, has been rated for the same property: that would be only ground for an appeal by him. But in fact it is not for the pier that *Simmonds* is rated. No informality in the rate can be objected to, as the case is stated: if it could, the Court would amend the rate, inasmuch as the Sessions have power to do so under sect. 103. [*Patteson* J. The power rather seems intended for the relief of persons appealing, not respondents.]

Needham and *Sumner*, contrà. The real question is, whether the appellants are to be rated for the barges and the bridges: whether the word "pier" be a proper one is immaterial. The question is as to all which is not building. [*Coleridge* J. The other side will not admit that that is the question.] It is as if the barges and bridges were occupied by one person and the

building by another, and the appeal were by the former. The barges and bridges cannot properly be classed under any of the subjects of rating specified in sect. 66. The only terms which can be suggested as applicable are "hereditaments, or premises." But this is a statute imposing a burthen, and must be construed strictly. The statutable purpose of the rate is "to defray the expenses of watching, lighting, and otherwise improving the roads, streets, lanes, courts, alleys, and other public passages and places under the jurisdiction of the said Trustees within the said districts, and for removing and preventing nuisances, annoyances, and encroachments therein and incidental thereto, and for other the purposes of this Act." Now the barges and bridges are not passages or places within the jurisdiction of the Trustees; they could not be paved or lighted. [Lord *Campbell* C. J. Is nothing to be rated which cannot be paved or lighted?] It is enough to say that the subjects here rated are not expressly mentioned, and do not fall within the general purpose of the Act. No benefit is derived in respect of them from putting the Act in execution. The general object of the Act appears from earlier sections. Sect. 19 gives the Trustees power to light and watch "the several roads, streets, squares, lanes, alleys, courts, yards, and other public passages and places under" their jurisdiction; this clearly applies only to what is on land. The same inference arises from sects. 20 and 21. The word "places," which is the most general, is manifestly applied only to so much of the shore and soil as is benefited by the Act. [Lord *Campbell* C. J. The owners of the pier would be benefited by the lighting of the neighbouring soil.] That would apply to many

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occupiers of land out of the district, or to the owner of a barge floating near. If the barges and bridges are rateable only as increasing the value of the building, that is a reason for increasing the rate on *Simmonds*, the occupier of the building, but not for rating the owners of the barges and bridges. If, indeed, the ownership of these amount to an occupation of the soil to which they are anchored, that is, the bed of the river, the occupiers would be rateable as occupiers of that soil, if they occupied it exclusively, as in *Rex v. Bell* (a). But that is not the rate now in question; nor is there any exclusive occupation; nor is there a rateable occupation at all: the barge is not moored to the soil for the improvement of the soil, but only for the purpose of steadying the chattel. [Lord Campbell C. J. For what purpose is a weighing machine fixed to the soil?] The test, whether a chattel has become part of the freehold, is, whether the annexation "was for the permanent and substantial improvement of the dwelling, in the language of the Civil Law, *perpetui usûs causâ*, or in that of the *Yearbook*, *pur un profit del'enheritance* (b), or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel;" *Hellawell v. Eastwood* (c). It is impossible to treat this as a mere rate on the adjacent land: the easement is specifically rated. But, if the rate be on the adjacent land, then the appellants are rated for what is occupied, not by them, but by *Simmonds*. And *Simmonds* is rated for it already, as indeed he might have been, under sects. 72, 74, even if the appellants could be considered the occupiers of a small part of the building: and, supposing that so, it is

(a) 7 T. R. 598.

(b) *Mitch.* 20 H. 7. fol. 13 B. pl. 24.(c) 6 *Exch.* 295. 312.

clear that the effect of the same sections is to relieve the occupier. *Simmonds* is rated for all the premises "exclusive of the steam boat pier," that is, excluding only the floating structure. The question therefore comes back to this: whether the floating structure is rateable per se. [*Wightman J.* Might not there be a rate on land benefited by having the easement attached to it?] That is not done here: a rateable subject is joined with a subject not rateable, each being distinctly specified as an independent subject of rate: and, as the two are not valued separately, the whole rate is vitiated; *Rex v. Cunningham (a)*. The Sessions have not furnished the Court with means of apportioning, so as to sustain the rate for what is legally rateable, as was done in *Rex v. Snowden (b)*. It is true that the question is left to the Court irrespectively of value: but that means only that no point is made as to the value of the particular items: the objection, that non-rateable items are included in the rate, is still open.

LORD CAMPBELL C. J. I am of opinion that the rate and the order of sessions should be confirmed. When I look at the form of the rate, I do not find anything rated that may not be the subject of rate. I agree with Mr. *Needham* that, though the question of value is not proposed to the Court, still, if there be any thing included in the rate which is not rateable, the rate is bad. But I do not find that to be the case. The words in the rate are "tenement, land, landing place and premises, and the brow or brows, barge or barges, dummy or dummies, lying upon, fixed to or connected with the

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(a) 5 East, 476.

(b) 4 B. & Ad. 713.

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same tenement, land, landing place or premises, and the easement or easements, anchorage or anchorages, held, used or enjoyed therewith." Now "tenement, land, landing place and premises" clearly apply to the ground floor, the cellar, and the part of the land which is rateable. The rate does go on to enumerate other things which, perhaps, are not rateable per se. But that seems no more than an intimation that the increased value which they bestow upon the land is taken into consideration. It is not disputed that, where a subject is rateable, any thing which increases its value may be taken into consideration. Now it seems to me quite clear that, even under stat. 43 *Eliz. c. 2. s. 1.*, the appellants would be rateable to the poor in respect of the value conferred upon their land by the use of the pier: for the pier brings passengers for landing on and embarking from the land which is of itself subject to be rated. But the words of the local act here are more extensive than those of stat. 43 *Eliz. c. 2. s. 1.* Sect. 66 of stat. 10 *G. 4. c. cxxix.* makes every person rateable who shall "inhabit, hold, use, occupy, possess, or enjoy any" "hereditaments, or premises" within the district. It might perhaps be argued that this makes the floating pier itself a substantive subject of rate; for it is difficult to say that it is not part of the "premises," in what I may call the vulgar sense of the term. But undoubtedly it is rateable as accessory to the land. Mr. *Needham* very properly urged, and the argument was ingeniously pressed by Mr. *Sumner*, that *Simmonds* was already rated for all the land. And, if the rate on him included all that is *terra firma*, this would raise considerable difficulty. But, looking at the rate upon *Simmonds*, I do not think that it includes the part of the land connected with the pier,

nor that the rate on the appellants excludes that. That was the only point upon which I felt a difficulty. Mr. *Sumner's* argument struck me very much at first: but, on looking farther into the case, I think there is no such exclusion.

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PATTERSON J. I am of the same opinion. There would, no doubt, be some difficulty in the question if the property were rated twice over. But, when we look at the rate itself, the reverse is the fact: the rate is as plain as words can make it. *Simmonds* is rated only for the "mill and premises;" and, when the rate adds "exclusive of the steam boat pier," it clearly means to exclude so much of the "premises" as the appellants occupy for their pier. The property therefore has not been rated twice. The only question is, whether the rate on the land and landing place is vitiated by adding to it a rate on other things not rateable, without any separate estimate of the value laid on the several items. Nobody can doubt that the building is rateable in some way or other. It constitutes a passage for getting on board the steamers in the river. This, as to rateability, cannot be distinguished from the rest of the mill and premises: only, as I understand the argument, it is suggested that what is exclusively used for the pier does not come within the general object of the statutable rate, which is to defray the expences of watching and lighting, and therefore, so far as benefit is concerned, is unconnected with the pier. But the rating clause, sect. 66, contains nothing to authorize this construction: and the recital in sect. 1 states that provisions for cleansing, watching, lighting, &c., "would be of great benefit, safety, and convenience to the owners and inhabitants" &c. of "the said northern part of the

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said parish of *Lambeth*, and to the residue of the said parish, and to the public at large." But really that is not the question. As to the addition, in the rate, of the barges &c., which is said to shew that the Company is rated in respect of those items independently, I do not think that is the meaning of the words. The appellants are substantively rated in respect of land: and the additional words shew merely the mode in which the rate on the land is estimated: the boats, in this respect, cannot be disconnected from the land. The remark which I made, during the argument, as to the rate being amendable only on behalf of appellants, had reference to the power of amendment given to the Sessions under sect. 103: by sect. 70 the Trustees themselves have a general power of amendment.

COLERIDGE J. I am entirely of the same opinion. Mr. *Sumner* was right in pressing the objection to the double rating: and that objection must have prevailed if he could have shewn, from the facts, not only that one part is doubly rated (which is an objection in itself), but also that the part which is not doubly rated is not rateable at all. But I think the inference cannot be drawn without straining the words. *Simmonds* is rated for the "mill and premises." Now those words, if left to themselves, would include a considerable part of what is occupied by the Company. But then comes an express exclusion "of the steam boat pier." Supposing the words which express the exclusion to designate only the floating pier, no doubt *Simmonds* would be rated for all the land: but to understand the words so would be to violate their meaning. The objection fails, whether we look at the rate on *Simmonds* or that on the appellants. Then, on the facts of the case

without further adverting to the form, the Company are rateable. They occupy lands in respect of which they are rateable. That leaves the question one of mere value. Then for what are they rated? It is objected that, because the barges &c. are mentioned, we must assume that the rate is laid on them as distinct subjects of rating. That, I think, is not construing the rate fairly. The rate is substantially on a tenement made more valuable by the floating pier, which therefore is mentioned in addition to the tenement. I am not now pronouncing what, in cases in general, ought to be the mode of rating (for the language here is loose), but with reference to the question submitted to us. The power given to this Court, by the concluding words of the case, to affirm the rate must be construed by what precedes; and, so construing it, we must say that some rate is maintainable, and that there has been no error in substance. But I cannot help saying that the rate might be more judiciously worded.

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WIGHTMAN J. Had the rate been laid on the barges only, as distinct from the land, I should have paused before I affirmed it. But, taking the words of the rate, there is this dilemma. If the barges are rateable in themselves, the rate is unquestionably good. If they are not, and the case shews that they are merely accessories, then the rate may be maintained as being only on the land with its accessories; subject indeed to the difficulty suggested, that the meaning was not to rate the land at all, because *Simmonds* is already rated for the whole of the mill, and that therefore the rate is laid on the floating pier only. But this difficulty is met by the fact that *Simmonds* is rated for the "mill and premises"

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"exclusive of the steam boat pier." What does this mean to exclude? The floating part of the pier was no part of his premises; the exclusion must be of something which, but for the exclusion, would have been included. Therefore *Simmonds* is not rated for the land occupied by the Company and used as part of the pier.

Rate confirmed (a).

(a) See the next two cases.

The QUEEN *against* The NORTH and SOUTH SHIELDS FERRY COMPANY.

By stat. 10 G. 4. c. xcvi. a company was authorized to maintain a ferry by boats between N. and S., towns on opposite sides of the Tyne (which is there a navigable tide river), to erect ferry houses and offices on each side of the river for the habitation and use of the ferrymen managing the ferry, and the convenience of persons using it, to make and repair causeways at the landing places, and to make roads from the ferry on each side of the river, and purchase lands necessary for the purposes of the act; and to receive tolls for the passing to and over the ferry.

ON appeal by *The North and South Shields Ferry Company* against a rate for the relief of the poor of the township of *North Shields*, in the parish of *Tyne-mouth* in *Northumberland*, wherein the appellants were rated as occupiers of "a certain ferry, landing and tolls," the Sessions confirmed the rate, subject to a case.

The case is so fully abstracted in the judgment of the

The Company constructed landing places in two townships, on opposite sides of the river, with a toll house and gate on each; their boats passed from one to the other, across the river, the bed of which was not in either township: the tolls were collected entirely on the south side. No tolls could have been earned for the transit on the river without use of the landing places, nor for such use without the transit.

The Company were rated to the poor of the township on the north side, as occupiers of a "ferry, landing and tolls," in a sum including half the net value of the tolls.

Held: that the tolls could not be rated, either directly as being connected with real property occupied in the township and as thus ceasing to be incorporeal, or indirectly by taking them into account as profit of the lands.

But that the land should be rated on an estimate of the rent which might be obtainable for it in consideration of its being available for the purpose of earning the tolls. Also

That the rateable value of the land in question could not be ascertained by dividing the profits in the proportion of the land occupied in the two townships and the length of the transit.

Court that any further statement of it is considered unnecessary. The effect of the arguments, also, is completely stated in the judgment: and no further report of them appears to be requisite.

The case was argued in *Trinity* term, 1852 (*a*), by *Pashley* and *Otter* in support of the order of Sessions, and by *S. Temple* and *J. C. Heath*, *contra*.

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Lord CAMPBELL C. J., in this term (*November* 11th), delivered the judgment of the Court.

The appellants were rated to the relief of the poor in the township of *North Shields*, in the parish of *Tyne-mouth*, as occupiers of a “ferry, landing and tolls:” and the Quarter Sessions for the county of *Northumberland*, on appeal, confirmed the rate, subject to a case for the opinion of this Court.

It appeared that, by stat. 10 G. 4. c. xcvi. (*b*), the appellants were incorporated (*c*), and authorized (*d*) “to establish, keep, and maintain a ferry, consisting of one or more steam or other boat or boats, barge or barges, float or floats, raft or rafts,” or other vessels, “for the conveyance and passage of horses, carriages,” “foot passengers,” goods, &c., “over and across” the river *Tyne*, between *North Shields* in the county of *Northumberland* and *South Shields* in the county of *Durham*, and to erect “ferry houses and proper offices on each side of the

(*a*) *June* 5th. Before Lord Campbell C. J., *Coleridge*, *Erie* and *Crompton* Js.

(*b*) Local and personal, public, “For establishing a ferry across the river *Tyne* between *North Shields* in the county of *Northumberland* and *South Shields* in the county of *Durham*, and for opening and making proper roads, avenues, ways, and passages to communicate therewith.”

(*c*) Sect. 1.

(*d*) Sect. 2.

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said river for the habitation and use of the ferrymen having the care and management of the said ferry so to be established as aforesaid, and for the convenience of persons using the same, and to make and keep in repair proper causeways at the landing places of the said ferry so to be established as aforesaid on each side of the said river;" and all persons were to have liberty to pass the said ferry on payment of certain tolls granted by the Act.

By sect. 4 the Company were empowered to make a road on the north of the river *Tyne*, from the "new ferry to be established" to the main street of *North Shields*, and another road on the south, from the ferry to the main street of *South Shields* (a). The Company are restrained (b) from deviating from the line of the roads in the plan of reference without consent of the owners. By sect. 8 the Company are empowered, with the consent of the owners, at any time thereafter to alter or widen the roads, or to make new roads with consent of the owners of the lands.

By subsequent sections (c) the Company are empowered to purchase and take any lands necessary for the purposes of the act, or any ferry or ferries across the river *Tyne*.

A capital of 9950*l.* was to be raised before the powers of the Act were to be put in force (d).

By sect. 70 the Company were empowered, as soon as the ferry should be made fit for the passage of carriages, passengers, portable articles, &c., to "collect, and receive, before any carriages, horses, cattle, foot pas-

(a) " Into the street called *Dean Street*, communicating with the market place in *South Shields*."

(b) Sect. 5.

(c) Sects. 9 &c.

(d) Sect. 30. Sect. 34 enacts that the shares shall be personal property.

sengers, or portable articles" should be "permitted to pass over the said ferry, or through any gate to be erected by virtue of this Act across the approaches to the said ferry," certain tolls specified in the Act, and which were to "be paid every time of passing or repassing."

The river *Tyne*, between the two townships of *North Shields* and *South Shields*, is a public, tidal and navigable river. All the bed of the river below low water mark is in the parish of *St. Nicholas*, in the borough and county of *Newcastle upon Tyne*. The shore on each side, when left dry, is in the townships of *North* and *South Shields* respectively: but all vessels and things afloat anywhere on the river are in the parish of *St. Nicholas*.

The Company, under the powers of the Act, raised the required capital, and purchased a piece of land about fifty yards long and five or six yards wide, in the township of *North Shields*, and made the same into a landing place or approach communicating with and leading into the main street of *North Shields*: and they also purchased a similar piece of land in *South Shields*, of which they made a similar use. And on each of these landing places they erected a toll house and gate. They purchased three or four steam ferry boats, at a cost of 5000*l.*, and have kept up the same ever since. They also bought from the Dean and Chapter of *Durham* an ancient ferry over the *Tyne*. They began in 1830 to work their ferry with the steam boats, and have, since that time, worked it, and taken tolls according to the Act of Parliament.

The ferry boats, when working, are always afloat, and in the parish of *St. Nicholas*. The Company, by the

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consent of the Corporation of *Newcastle* (a), have erected at each of the landing places moveable platforms, so arranged as to enable passengers, cattle, &c. to embark in the steam boats in all states of the tide. The boats do not pursue the same track in crossing, but vary in their course, according to the state of the tide and other circumstances. For the first few years the tolls were collected on the *North Shields* landing place: they were afterwards collected for a short time on board the boats: but, at the time when the rate in question was made, and for several years previously, they were collected at the *South Shields* landing place.

The "ferry, landing and tolls" were rated in the rate in question at 531*l.*, the Sessions finding that the net annual profit of the tolls was 1062*l.* The gross yearly amount of the tolls appeared to be 3570*l.*, from which the Sessions deducted, for working expences, wages, stores, &c., 1637*l.*; for average repairs, 757*l.*; and, for contingent or casual average expences, 114*l.* The balance, 1062*l.*, they found to be the net annual profit of the tolls: and they assessed one half of that sum upon the appellants as the rateable value of the ferry, landing and tolls. The appellants derive no profits from the ferry or landing places, except the said tolls. The Sessions found that the net annual rateable value of the said landing place in *North Shields*, without taking the tolls into account, was 72*l.* (b).

(a) Then conservators of the river *Tyne*.

(b) The Sessions also found "that no tolls would be paid by persons for coming, either by themselves or with their cattle and goods, on to the landing places, unless they were also conveyed across the said river; and, on the other hand, that no person, either alone or with his carriages &c.,

The questions raised before us (a) in the argument were: first, whether the principle upon which the rate is laid at 531*l*. is correct; and, secondly, whether the rate ought to be laid upon the landing place only at the sum of 72*l*.

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It was contended, on behalf of the respondents, that the occupation by the Company of the landing places made the tolls rateable; and, secondly, that, at all events, the landing places are not rateable merely for their net rateable value independently of and unconnected with their value as enhanced by their being available for the purposes of the ferry and of earning the tolls.

On the first point, it was contended that, though tolls are not rateable per se, yet that they became so in the present instance, by being connected with real property occupied in the township for the purpose of earning such tolls. To support this rate, upon the half of the entire net proceeds of the tolls, it must be made out, either that the tolls can be directly rated as ceasing to be incorporeal and being landed property, on account of their connection with the landing places occupied by the appellants, or that they can be indirectly rated by the rate being put upon the landing places as land enhanced

would or could use the ferry boats without the convenience of landing places for embarking and disembarking." And "that the said ferry was of no value without landing places or approaches, which were in this case in the occupation of the appellants."

(a) The question was left by the Sessions in the following terms.

"If the Court of Queen's Bench are of opinion that the said landing place and tolls ought to be rated at 531*l*., then the order of the Sessions and rate are to be confirmed. But if the said Court are of opinion that the said landing place and tolls ought to be rated at 72*l*., then the said order of Sessions and rate are to be amended by striking out the words 'and tolls,' and reducing the rateable value of the said landing place from 531*l*. to 72*l*."

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in value by the amount of the entire net profit of the tolls.

When tolls are attached to and appurtenant to manors or lands, they are rateable as land; and, when they really arise from the use of lands, as in the cases of canals, bridges, railways, or the pipes of water companies, though not rateable per se, they may, after the proper deductions, be treated as the direct profits of the lands which are used in, and are the real cause of, the earning of the tolls.

We do not think that in the present case the ferry and tolls can be treated as appurtenant to the landing places so as to become part of the land. By the Act of Parliament, a company is established and incorporated for the purpose of setting up a ferry across the *Tyne*, which is to consist of one or more steamers or other boats, which were bought and kept up at great expense: and the powers of taking lands for the approaches to the main street of the town, for houses for the accommodation of the ferrymen, and for landing places, seem by the Act to be given as convenient and necessary for the ferry, and as incident and accessory thereto: and we find nothing in the Act to make the ferry or the tolls appurtenant to or annexed to the landing places or either of them, in the one township or the other, so as to make them accessory to the landing places; which seem, on the contrary, rather to be accessory and incidental to the incorporeal franchise which it was the object of the statute to create.

Nor do we think that the tolls can be indirectly rated by laying the rate upon the landing places, and treating the half of the entire net proceeds of the tolls as the direct profit earned by the use of such landing place.

The tolls are not the direct profit arising from the landing places, as in the case of canals, bridges, railways, or the mains and pipes of water companies: but they arise principally from the large capital employed in the boats, and from the transit of the boats, not over the land in question, but over a tidal river entirely situate in another township. We do not think that the authorities establish that tolls become rateable, directly or indirectly, by reason of some portion of land being used, although necessarily used, in the earning of the tolls. When the use of the land is so small a part of the consideration for the toll, it would manifestly be unfair to throw the whole burthen on the small portion of land. In the case of canals, the profits may be said to arise mainly from the occupation of the whole line of land, covered with water, occupied by the canal company, and along which the transit takes place. And this is said by Mr. Justice Bayley, in *Rex v. Nicholson* (a), to be the ground of rating canals in respect of their tolls. So, in the case of bridges, the whole profit arises from the bridge attached to the freehold, and part of the freehold. The same observation applies to the mains and pipes of the

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(a) 12 East, 330. 336. Reference was made, in the argument, to *Rex v. Sir A. Macdonald*, 12 East, 324; *Regina v. Leith*, ante, p. 121; *Rex v. Barnes*, 1 B. & Ad. 113; *Regina v. Hammersmith Bridge Company*, 15 Q. B. 369; *Regina v. The Marquis of Salisbury*, 8 A. & E. 716; *Rex v. Coke*, 5 B. & C. 797; *Peter v. Kendal*, 6 B. & C. 703; *Williams v. Jones*, 12 East, 346; *Rex v. Snowden*, 4 B. & Ad. 713; *Rex v. The New River Company*, 1 M. & S. 503; *Rex v. The Corporation of Bath*, 14 East, 609; *Rex v. Ellis*, 1 M. & S. 652; *Rex v. The Aire and Calder Navigation Company*, 9 B. & C. 820; *Rex v. The Aire and Calder Navigation*, 3 B. & Ad. 139; *Rex v. Milton*, 3 B. & Ald. 112; *Rex v. Bell*, 5 M. & S. 221; *Heddey v. Welhouse*, Moore, 474; *Rex v. Fowke*, 5 B. & C. 814, note (a); *Rex v. Bilton*, 5 B. & C. 851; *Attorney General v. Jones*, 1 Macn. & Gord. 574. 592; *Regina v. Hull Dock Company*, 7 Q. B. 2.

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water companies. And the principle has been applied to the lines of railways, though great difficulty has arisen in so applying this principle to the lines of railway companies conducting their business as carriers, and not merely as persons entitled to take tolls on a public line of road. Still, however, even in the case of railways, the profits may be said to arise mainly from the use of the line occupied by the companies as real property. If the mere use of any land conducive to the earning of the tolls would make the tolls rateable, either directly or indirectly, as contended for by the respondents, it is difficult to see why the tolls were not rateable in the case of *Rex v. The Mersey and Irwell Navigation Company (a)*, by reason of the use of the dam, which was absolutely essential for the purpose of the navigation. So in the case of *Rex v. Tynemouth (b)*, though the lighthouse was rateable property, the tolls did not therefore become rateable. We agree with what is said by Mr. Justice Bayley in *Rex v. Tynemouth (c)*, where, in answer to the case put of a toll for the use of a mooring post affixed to the freehold, he says: "the rate in such a case would be upon the post;" that is, not on the tolls.

Assuming, then, that the rate is really in the present instance to be made upon the landing place as land, just as it is intimated, in the case of *Rex v. Tynemouth (b)*, a rate ought to have been laid on the lighthouse, or on the mooring post, it remains to consider on what principle the amount of such rate is to be fixed (*d*).

In the case of the mooring post, it would not seem

(a) 9 B. & C. 95.

(b) 12 East, 46.

(c) Ib. 49.

(d) Reference was made, in argument, to *Rex v. The Proprietors of the Liverpool Exchange*, 1 A. & E. 465; *Regina v. Guest*, 7 A. & E. 951.

unfair in such rates to take all the net profits of the tolls, as they directly arise from the use of the corporeal hereditament. And there would be much more reason for taking the whole profit of the tolls into the calculation in the case of a lighthouse, where the whole meritorious consideration for the tolls arises from the use of the corporeal hereditament, and arises within the parish. We think that in the present case, in rating the landing place, the profit of the tolls cannot properly be brought into the calculation as the profits of the occupation of the landing place; which is in effect done by the rate. On the other hand, the existence of the tolls cannot be wholly excluded from consideration: but the land should be rated, not according to the view of the appellants, as land in that situation without reference to the tolls at all, but according to the principle relied on by the counsel for the respondents in the second branch of their argument: and the value should be taken, not as the value of the land merely, but as the value of land as enhanced by being available for the purpose of earning the tolls. This appears to be the true principle, according to the test laid down in the Parochial Assessment Act (a), as it would be the rent that could be obtained, and which the Company would have to pay, for the land, for the purpose for which it is available under the circumstances. We think, therefore, that the order of the Sessions should be quashed, and that the landing places should be rated as land rendered more valuable by being available for the purposes of earning the tolls.

It has been suggested that the mileage principle might be applied in calculating the rateable value of the land

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(a) Stat. 6 & 7 W. 4. c. 96. s. 1.

1852. in question, and that a proportion of the profits might be assessed on the two landing places, according to the proportion which their dimensions bear to the length of the transit over the river. This principle may be fair in the case of profits derived from the use of land by a canal or railway running through different parishes (a). But we cannot think it at all applicable to a case where the toll is principally earned, not by any use of land, but by a voyage over a tidal estuary, not performed in any particular course, and where it is not pretended that the parish in which the tidal river is situated could say that there was any use or occupation of land in their parish.

Order of Sessions quashed (b).

(a) In the argument, reference was made to *Rex v. The Leeds and Liverpool Canal Company*, 5 East, 325; *Regina v. The Grand Junction Railway Company*, 4 Q. B. 18; *Regina v. The Great Western Railway Company*, 6 Q. B. 179.

(b) See the next case.

The QUEEN against MORRISON and FAWCAS.

M. occupied a ship building yard on the bank of a tidal navigable river; on the river itself was a ship dock belonging to *M.*, which floated at high water, and grounded at low water upon a part of the bed of the river. Owners of land on the bank, who used the adjacent bed of the river, paid an acknowledgment to the Conservators. *M.* used the floating dock for the repair of ships; and his workmen passed to it by a plank which rested on it and on the land of the yard, and was fastened by a staple to the dock. The dock was moored to the bed of the river by chains, and was also attached by chains to the yard. The chains were capable of being slackened, to enable the dock to be taken into deeper water, which continually occurred; and sometimes the harbour master removed the dock altogether.

M. was rated to the poor for his "river frontage, with floating dock attached," at an amount which was the aggregate of the separate value of the yard and the dock. The Sessions, on appeal, held that the floating dock was not rateable, but that the value of the yard was enhanced by it to the amount assessed; and they confirmed the rate.

This Court reduced the rate to the separate value of the yard, holding that the floating dock could not be considered accessory to the yard.

the Sessions confirmed the rate, subject to a case of which the material parts were as follows.

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The appellants are copartners, as shipwrights, and are and have been, since *May* 1850, the sub-tenants from year to year, and occupiers, at the annual rent of 50*L*., of a ship building yard and piece of ground adjoining the river *Tyne*, where public, tidal and navigable, and situate in the above township. The whole of this yard is above the high water mark, is separated from the shore of the river, and bounded by a quay or wall, about thirteen feet high, and extends in breadth parallel to the river about forty nine yards, and in depth, at right angles from the river, about thirty two yards. At high tide the water rises to within a few feet of the top of this quay or wall, and at low tide recedes, so as to leave dry the whole of the quay or wall, and also the ground or shore below the quay, to a distance of from twenty to thirty yards, according as tides are neap or spring. The property in the ground or shore between high and low water mark in the river *Tyne*, at this part of the river, is a subject of doubt; and, though occasionally used by the occupier of the land in front of which it is situate, an acknowledgment is usually paid to the conservators of the *Tyne*, who were till lately the Corporation of *Newcastle upon Tyne*; which Corporation held the river *Tyne* and port of *Newcastle upon Tyne* in fee farm by a charter or grant from the Crown.

The Conservatorship of the river *Tyne* has, however, been removed, by *The river Tyne Improvement Act*, 1850 (*a*), from the Corporation to Commissioners chosen from the boroughs of *Newcastle upon Tyne*, *Gateshead*,

(a) 13 & 14 *Vict. c. lxiii.*, local and personal, public. See sect. 27.

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Tynemouth and *South Shields*: and the foreshore is claimed by the owner of the adjoining property, but is also claimed by the Mayor and burgesses of *Newcastle upon Tyne*: and whether it belongs to either of the above parties, or to the Crown, or to the Commissioners for the Conservancy of the river appointed under the said Act, is not decided.

The bed of the river, that is the soil below low water mark, and also the river itself, are, from a point called *Hedwin Streams* seven miles above *Newcastle* down to another point about ten miles below *Newcastle* and called the *Spier Hawk* situate in the sea just at the mouth of the said river, within the parish of *St. Nicholas Newcastle*. A part of the river, in length about two miles, between these two points forms the southern boundary of the township of *North Shields*. The shore of that part of the river is, when dry, within that township, the water being the boundary; but, as the tide rises, every thing floating in that part of the river, and whether within or below low water mark, is in the said parish of *St. Nicholas*.

In the year 1850 the appellants constructed a wooden vessel or cradle called a floating dock, at a place called *Howdon*, two miles distant from the building yard, and towed the same down the river opposite to their said yard, and have ever since used the same for repairing ships in their business of shipwrights. The mode of using it is as follows. When a vessel requiring repair is to be put into the dock, the dock is hauled a little further into the river, where the water is deeper, and certain plugs are taken out, whereby the water is admitted, and the dock sinks, and grounds on the shore adjacent to the building yard, or partly on the shore and partly on

the bed of the river below low water mark. The gates of the dock are then opened; and, whilst it remains sunk and aground, the vessel to be repaired is at high tide hauled immediately into the dock, and allowed to settle down in the same as the tide falls. At low tide, the dock gates are closed, and the plugs replaced; and any water which has not run out is pumped out. With the next tide, the dock containing the vessel rises and floats and is hauled in again towards the shore; and, as the tide falls, again grounds: but, the interior being kept clear of water, the repairs of the ship inside go forwards, whether the dock is aground or afloat, and rather more conveniently when afloat than when aground. When the repairs are finished, the plugs are taken out again, which has the effect of sinking the dock: and, when there is a sufficient depth of water, the gates are opened; and, the dock remaining sunk, the vessel is hauled out. When a vessel is in the dock, the latter is usually moved about thirteen feet from the said quay or wall; and a boat can pass between the dock and the yard at high tide. To enable the workmen to get to their work, a plank or gangway goes from the quay or yard to the floating dock, such gangway or plank merely resting at each end respectively on the building yard and floating dock; and a rope passes through a staple at that end of such plank which rests on the floating dock; which rope is tied to the floating dock, to prevent the plank falling if it should happen to be accidentally pushed off the dock; and such plank or gangway is moved to any part of the yard or dock, as convenience may require. The floating dock is moved by several chains. Three of these chains are attached to anchors or posts in the bed of the river; and

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two of them are put round posts standing in the said building yard, the other ends being on board the floating dock. Each of these chains can be easily slackened, or altogether cast off by the hand, as readily indeed as a ship is loosed from her moorings. And this is done every time a vessel is docked or undocked, in order that the dock may be hauled off a little further into the river; which is done to facilitate the operation of getting into deeper water. The time that vessels remain in the dock varies from two days to three weeks, according to the extent of repairs required.

In order to use the floating dock in the way described, the license of the said Conservancy Commissioners is necessary: and their officer, the harbour master, has power to remove the said floating dock for a time when the convenience of the harbour so requires. He once (but not since the making of this rate) caused the dock to be removed and kept away for two tides, in order that a steamer, which had foundered near, might be raised. Thus the dock, when moored, is alternately in the parish of *St. Nicholas* and the respondent township, according as it is afloat or aground; in each of which states it is for about an equal time each day; but occasionally, when hauled off below low water mark, and when removed to another part of the river, it is altogether out of the respondent township.

From the time the appellants first became occupiers of the building yard down to *October* last, when the present rate was made, and during a year and a half of which period they had possessed and used the said floating dock in the manner before described, they were rated to the relief of the poor of the township of *North Shields* in respect of the said building yard, as follows.

Name of Occupier.	Name of Owner.	Description of Property.	Situation.	Gross estimated Rental.	Rateable Value.
<i>George Wilson Morrison and George Fawcus.</i>	<i>E. J. Collingwood.</i>	Building yard.	<i>Limekiln Shore.</i>	<i>£ s. d. 52 0 0</i>	<i>£ s. d. 46 0 0</i>

It being customary in this township to deduct about 10 per cent., for outgoings and repairs, from the gross rental of property in the township, to give the rateable value.

A new valuation of the property in the said township having been recently made, the overseers by a rate made, 14th *October* 1851, for the relief of the poor, at 2s. 3d. in the pound, from 25th *September* to 25th *December* 1851, rated the appellants in respect of the same premises as follows.

Name of Occupier.	Name of Owner.	Description of Property.	Situation.	Gross estimated Rental.	Rateable Value.
<i>George Wilson Morrison and George Fawcus.</i>	<i>E. J. Collingwood.</i>	160 feet of river frontage, with floating dock attached.	<i>Limekiln Shore.</i>	<i>£ s. d. 163 0 0</i>	<i>£ s. d. 147 0 0</i>

Against this latter rate the appellants appealed on sixteen grounds, which were set out in the case, and which raised in different forms the questions discussed in the argument. The fourth was as follows.

“That the said 160 feet river frontage cannot be rated at a higher rate than it otherwise would be on account of the said floating dock alleged to be attached thereto.”

At the hearing of the appeal, the foregoing facts were proved. And the Sessions found that the rateable value

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of the building yard was 57*l*., and of the floating dock, if rateable, 90*l*. a year. It was agreed that the words "river frontage" in the rate meant the said building yard.

On these facts, it was contended by the appellants that, admitting the principle that lands and houses are rateable according to their actual value, as combined with the machinery attached to them, without considering whether that machinery be real or personal property, whether it would go to the heir or executor, or whether on the expiration of the lease it would go to the landlord or lessee, still such machinery must, in the first place, for its ordinary use, be actually attached to the soil or the walls, so as for the time at least to form part of the soil or building, or, in other words, to be a fixture: and, secondly, the machinery must be and remain permanently and continually, i. e. during the time of its use and the period for which it is rated, within the rating parish or township. And that the said floating dock was not a fixture, nor so actually attached to the soil or walls of the said building yard as to form part thereof, nor permanently or continually during the time of its use, and the time for which the rate was made, situate within the rating township, inasmuch as the said dock was about twelve hours out of every twenty four within the parish of *St. Nicholas*.

The Sessions however held that, though the floating dock was not rateable per se, it was, by means of the said mooring chains passing from the same to the said posts in the said building yard, so connected with the said building yard (although not permanently and continually, but only occasionally, attached) as to enhance the value thereof; and that the rateable value of the

said building yard was thereby enhanced to 147*l.*, being the aggregate of the above mentioned sums of 57*l.* and 90*l.* They therefore affirmed the rate, subject to the opinion of the Court of Queen's Bench, whether, upon the facts above stated, the value of the said building yard can, according to law, be so enhanced by such attachment or connexion of the said floating dock thereto as to increase the rateable value of the said building yard to the amount above stated.

If the Court of Queen's Bench are of opinion that this question must be answered in the affirmative, the said rate is to stand affirmed: but, if the said Court are of opinion that the said question must be answered in the negative, then the said rate is to be amended by reducing the rateable value of the said premises of the appellants to 57*l.*

The case was argued in this term (a).

Otter, in support of the order of Sessions. The floating dock is itself not rated; and the Sessions held that it was not rateable. They have rated the river frontage, that is the land where the building yard is situate, with the floating dock attached; finding, as a fact, that the floating dock is so attached to the building yard as to enhance its value. Unless, therefore, that which is true in fact is legally impossible, this is simply a rate on the occupier of real property of which the value is enhanced by that which is accessory to it. It is not necessary that that which so increases the value should be in the same parish. In *Regina v. Southampton*

(a) November 6th. Before Lord Campbell C. J., Coleridge, Wightman and Erle Js.

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Dock Company (a) the occupiers of a dock were allowed to deduct, from the rateable value of the land occupied by them for their dock, the expense of a steam tug, which brought vessels in and out of their dock, though it was not attached to the shore and not stationary at all, but was employed to tow vessels to different parts of the *British Channel*. The reason was that, as the profits, for which the occupiers were rated, were enhanced by this use of the steam tug, the expense of the steam tug was money laid out in earning the profits, and therefore constituted a proper deduction, as being ancillary to the use of the dock. On the same principle the profits must be here rated as augmented by the floating dock which is ancillary to the use of the building yard. So the rateable value of land occupied by a railway in a parish is enhanced by the fares, wherever paid. [*Erle J.* By the fares earned in that parish.] In *Rex v. The New River Company* (b) the owners of a spring were held rateable for its value in the parish where it rose, though none of the water was distributed in the parish and the profit did not become due there. Where land in one parish had been waste, in which owners of land in another parish had a right of common appurtenant, and the waste was inclosed and allotments given to the owners entitled to common, it was held that such allotments were to be assessed to the poor rate of the parish in which the waste was situate; *Kempe v. Spence* (c). Here in fact the floating dock is for half of every day in the parish; that it is sometimes out of it may affect the question of the value, but cannot be a reason for

(a) 14 Q. B.

(b) 1 M. & S. 503.

(c) 2 W. Bl. 1214.

entirely disregarding the value it bestows. It must be presumed that the Sessions have allowed for this. Secondly, it is not necessary that what enhances the value should be permanently attached, nor that it should be attached at all. The cases already cited illustrate this. Similarly, in *Regina v. Leith* (a) the occupiers of land to which a floating pier was attached were held rateable for the value of the land as enhanced by the use of the pier. There the rate, on the face of it, appeared to specify the floating pier, consisting of barges, as rateable per se: here that is expressly excluded by the finding of the Sessions. The attachment there was effected only by planks laid from the floating pier to the land. In *Rex v. Bradford* (b) the rateable value of a house was held to be enhanced by its having the privilege (not even a corporeal subject) of being used as a canteen. It is unimportant how the annual value of the land is increased. A house would earn a higher rent from its commanding a fine prospect: but such enhancing of the rent could not be excluded from the rateable value.

J. C. Heath, contra. The attempt is to rate the floating dock. It is true that the Sessions state that they have held the dock not rateable, and that they consider the value of the building yard enhanced by the dock. But it appears that they have estimated the value by adding together the values of the two as if they were independent subjects of rate. They have taken "the aggregate" of the values. The Court will therefore not be bound by the express terms of the

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(a) *Ante*, p. 121.

(b) 4 M. & S. 317.

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finding, but will look at what has in effect been done; *Rex v. St. Mary the Less* (a), *Rex v. Tedford* (b). The substantial question therefore is before the Court. Now, as stat. 3 & 4 *Vict. c. 89.* (continued to the present time) makes the profits of stock in trade or other property not rateable, the question is, whether the appellants have been duly rated in respect of an occupation of a corporeal hereditament. The dock is not rateable as part of the yard: it is not a fixture. In *Rex St. Nicholas, Gloucester* (c), the value of a machine was indeed taken into consideration; but there the machine was considered to be part of the house. Machinery has been held rateable, only where it has had the character of a fixture, or at any rate has not clearly had an opposite character; *Rex v. Hagg* (d), *Rex v. Lord Granville* (e), *Rex v. The Birmingham and Staffordshire Gas Light Company* (g), *Regina v. Southampton Dock Company* (h) (the case of the cranes). A similar principle prevails in deciding whether a thing be that of which the occupation confers a settlement; *Rex v. Londonthorpe* (i), *Rex v. Otley, Suffolk* (k), *Rex v. St. Dunstan, Kent* (l). [Lord Campbell C. J. Is it contended, on the other side, that the floating dock is rateable as a fixture? *Otter*. Certainly not.] The value cannot be added to that of the land, unless there be a necessary connection between the two, as in *Regina v. Leith* (m), *Rex v. The Proprietors of the Liverpool Exchange* (n) (where the connection was by virtue of

(a) 4 T. R. 477.

(c) *Cald.* 262.

(e) 9 B. & C. 188.

(h) 14 Q. B.

(k) 1 B. & Ad. 161.

(m) *Antè*, p. 121.(b) *Burr. S. C.* 57.(d) *Cald.* 266.

(g) 6 A. & E. 634.

(i) 6 T. R. 377.

(l) 4 B. & C. 686.

(n) 1 A. & E. 465.

a statute), and *Regina v. Bradford* (a) (where the value was enhanced by a privilege attached exclusively to the house). This dock could not have been distrained for the rent of the land; *Capel v. Buzzard* (b): nor could it be taken into account in estimating the double value of the land, under stat. 4 G. 2. c. 28. s. 1.; *Robinson v. Learoyd* (c). The dock cannot even be said to create an occupation of the spot where it lies, as it is liable to be moved away at the pleasure of the harbour master. No settlement would be gained by the occupation of the dock as a tenement; *Rex v. Dodderhill* (d), *Rex v. Mellor* (e). If the land belonged to one person and the floating dock to another who had only the right of way to it, the former would be rateable for the land alone, the latter would not be rateable at all. How then can the owner of the two be rateable for the aggregate value? But, further, the floating dock is not permanently within the rating township: it is as much within the parish of *St. Nicholas*. That this prevents it from being a subject of rate in such township appears from *Regina v. The Cambridge Gas Light Company* (g). In *Regina v. Leith* (h) the question as to the parochial locality was not raised.

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Cur. adv. vult.

Lord CAMPBELL C. J., on a later day in this term (*November 17th*), delivered the judgment of the Court.

We are of opinion that the rate in this case, as laid, cannot be supported. The Sessions very properly held

(a) 4 M. & S. 317.

(c) 7 M. & W. 48.

(e) 2 East, 189.

(b) 6 Bing. 150.

(d) 8 T. R. 449.

(g) 8 A. & E. 73.

(h) Antè, p. 121.

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that the floating dock per se was not properly rateable under stat. 43 *Eliz. c. 2. s. 1.*: and the only question is, whether the rateable value of the ship building yard is to be considered as enhanced by reason of the floating dock. Looking to the manner in which the floating dock is constructed and used, we think that the Sessions have come to an erroneous conclusion in point of law upon this question.

This floating dock exactly resembles a ship at anchor, which occasionally grounds when the tide ebbs, and which may be approached either by a boat or by a plank. It has no necessary connection with the yard. The two might easily be in the separate occupation of different shipwrights, carrying on business separately; and the accidental proximity of the one to the other is for this purpose immaterial. If words had been introduced into stat. 43 *Eliz. c. 2. s. 1.* making the floating dock rateable, the floating dock and the yard being in different parishes, there would have been as much reason for contending that the yard was an accessory to the floating dock as that the floating dock was an accessory to the yard.

This does not appear to us to come within any of the cases in which it has been held that the rateable value of real property may be enhanced by circumstances which increase its profitable value to the occupier. The decisions respecting machinery and other fixtures of course can have no application. The steam tug in the *Southampton Case* (a) was not made the subject of the rate; and the only question there was, whether the appellants, the Dock Company, should not, in estimating their profits, be allowed a deduction in respect of the

(a) *Regina v. Southampton Dock Company*, 14 Q. B.

steam tug which was necessary for carrying on their business. *Regina v. Leith* (a) comes much nearer the present case: and some expressions there used by the Court would in their generality countenance the doctrine for which the respondents now contend. But those expressions must be taken in reference to that case, which is materially different from the present. The pier there was permanently fixed to the landing place; and the one could not be used without the other. Besides, that case did not turn upon the construction of stat. 43 *Eliz.* c. 2. s. 1., but of a recent local act, which contains words much more extensive with respect to property made rateable.

This being our opinion, it is unnecessary for us to consider the effect of the floating dock being sometimes in one parish and sometimes in another: and we have only to direct that the rate be amended by reducing the rateable value of the appellants' premises to the sum of 57l.

Rate reduced accordingly (b).

(a) *Antè*, p. 121.

(b) The decision in *Regina v. North and South Shields Ferry Company* (*antè*, p. 140) was pronounced between the day on which the case in the text was argued and the day on which the above judgment was given.

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The Viscount CANNING *against* EPHRAIM RAPER.

A deed, between *B.* and *R.*, recited that *B.* and *R.* had become jointly and severally bound to *W.* in 2000*l.*, by bond conditioned for payment by them of 1000*l.* and interest on a day named, and that *R.* executed the bond at the request of and as surety for *B.*, on *B.* agreeing to indemnify *R.* by assignment of the estate and effects of *B.*, and of *R.* entering into covenants as thereinafter contained; and the indenture witnessed that, in pursuance of the agree-

ment and of *R.* having so joined as surety, and of ten shillings, *B.*, by way of underlease, demised leasehold premises to *R.* The deed contained a declaration that the premises were underleased for the purpose of keeping *R.* indemnified from liability and loss which might occur to him from having so become surety; and a proviso that, if *B.* should pay the principal sum and interest, and keep *R.* indemnified, those presents should be void: nevertheless that, if *R.*, as surety, should bear any loss or pay any money, *R.* might levy and raise such money, loss, &c., as he should pay, sustain, &c., with interest, by rent from the premises, or mortgage, or sale. *R.* covenanted, in case the moneys due on the bond should be paid by *B.* without calling on *R.*, that *R.*, on the bond being delivered to him to be cancelled, would reassign the premises. *B.* covenanted to indemnify *R.* against the bond.

Held, that this deed required a mortgage stamp, under stat. 55 G. 3. c. 184., Schedule, part I., tit. *Mortgage*.

COVENANT. The declaration stated that *Joan*, Viscountess *Canning*, being seised as of fee of certain tenements, parcel of the manor of *Stebunheath*, otherwise *Stepney*, in *Middlesex*, to hold a part thereof at the will of the lord to her, her heirs and assigns for ever, and the remainder of the lord by the rod, according to the custom, and being also seised of other premises in her demesne as of fee, on 10th *September* 1834 demised the whole, by indenture of that date, to *George William Veasey*, habendum to him, his executors, administrators and assigns, from 29th *September* then next, for twenty seven years and a half, at a yearly rent of 340*l.*, payable to Viscountess *Canning*, her heirs and assigns, on 25th *December*, 25th *March*, 24th *June* and 29th *September*: and *G. W. Veasey*, for himself, his heirs, executors, administrators and assigns, covenanted with Viscountess *Canning*, her heirs and assigns, to pay the rent on the days appointed. That *G. W. Veasey* after-

wards, to wit 29th *September* 1834, entered into the demised premises, and was possessed thereof for the term. "That, after the making of the said indenture, and during the said term thereby granted, to wit on the 1st day of *January* A. D. 1849, all the estate, right, title, interest, term of years then to come and unexpired, property, profit, claim and demand whatsoever of the said *G. W. Veasey* of and in and to the said demised premises, with the appurtenances, by assignment thereof then made, legally came to, and vested in, the defendant: whereupon the defendant then entered into and upon the said demised premises, and then became possessed thereof, and continued so possessed thereof from thence hitherto." That, during the term, to wit 17th *March* 1837, *Viscountess Canning* died seised of the reversion, intestate, leaving plaintiff her only son and heir, according to the custom. Whereupon the reversion in that part of the demised premises whereof *Viscountess Canning* was seised in her demesne as of fee descended and came to plaintiff as her son and heir. That, after her death and during the term, at a general court baron or customary court of the lord of the manor, holden 24th *April* 1848, the homage presented that *Viscountess Canning* died seised to her and her heirs of the reversion of and in the customary tenements; and the lord granted the reversion of and in the first mentioned parcel of ground to plaintiff, to hold to him, his heirs and assigns, for ever at the will of the lord; and of and in the secondly mentioned parcel of ground to plaintiff, to hold to him, his heirs and assigns for ever of the lord by the rod, according to the custom: and plaintiff was then, according to the custom, admitted tenant of the said reversion of and in the customary parcels of ground,

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in manner and form aforesaid, and thereupon became and was seised &c. (of the reversion of and in the two, as before severally described). Breach : non-payment of five quarters' rent, which had become due after the death of Viscountess *Canning*, and whilst plaintiff was so seised ; the last quarter ending 25th *December* 1851.

Pleas 1 and 2 : Traverses of allegations in the declaration. Issues thereon.

Plea 3 : "That all the estate, right, title, interest and term of years then to come and unexpired, of the said *G. W. Veasey*, of and in the said demised premises, with the appurtenances, by assignment thereof did not come to and vest in the defendant, in manner and form" &c. : conclusion to the country. Issue thereon.

On the trial, before *Coleridge J.*, at the *Middlesex* sittings in *Easter* term 1852, the defendant admitted that the plaintiff was entitled to the verdict on the first and second issues. As to the third issue, the plaintiff relied upon letters from the defendant and his attorney, as admissions of the rent being due, and of his liability to pay it to the plaintiff. For the defendant it was contended that he was not liable upon the covenant, as assignee of the term, but that he held the premises by an under-lease ; in proof of which a deed was offered in evidence. The material parts were as follows.

The indenture, dated 5th *August* 1841, was made between *William Bonfield* and *Thomas Bonfield*, of one part, and the defendant *Ephraim Raper*, of the other part. It recited that, by a bond, *W. Bonfield*, *T. Bonfield* and *E. Raper* had become jointly and severally bound to *Robert Warner* in the penal sum of 2000*l.*, with condition for payment by *W. B.*, *T. B.* and *E. R.*, or either of them, their or either of their executors or administrators,

to *Warner*, his executors, &c., of 1000*l.* and interest, on the day named in the condition: Also a similar bond, to the like amount, to *Simon Goodman*, similarly conditioned: Also that *W. B.*, *T. B.* and *E. R.* had jointly executed a promissory note for securing to *George Game Day* payment of 1500*l.*, with interest, at a day named in the note: "And whereas the said *E. Raper* executed the two hereinbefore in part recited bonds and note of hand, respectively, at the request of and as surety for the said *W. Bonfield* and *T. Bonfield*, on their agreeing to indemnify the said *E. Raper* from loss by an assignment of the estate and effects of the said *W. Bonfield* and *T. Bonfield*, and of their entering into covenants as is herein-after contained:" further recital of an indenture, dated 19th *December* 1839, whereby *George William Veasey* assigned to *W. Bonfield* and *T. Bonfield* his interest in the trade carried on by him at a wharf; and a further indenture of the same date, whereby he also assigned the residue of a term of twenty seven years and a half in the premises after described, and intended to be assigned, to *W. Bonfield* and *T. Bonfield*, their executors, &c. "And whereas the said *W. Bonfield* and *T. Bonfield*, to indemnify the said *E. Raper* as aforesaid, have agreed to assign all their joint and separate estate and effects, and to grant an under-lease of the said wharf, to the said *E. Raper*, as and in the manner hereinafter mentioned: Now this indenture witnesseth that, in pursuance of the said agreement, and in consideration of the said *E. Raper* having so joined as surety with the said *W. Bonfield* and *T. Bonfield* as hereinbefore mentioned, and also in consideration of the sum of 10*s.* apiece paid" to *W. B.* and *T. B.* by *Raper* (receipt acknowledged), "they, the said *W. Bonfield* and *T. Bon-*

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field, have, and each of them hath, by way of under-lease, demised, and by these presents do, and each of them doth, by way of under-lease, demise, unto the said *E. Raper*, his executors, administrators and assigns, all that piece or parcel of ground" &c. (describing buildings and land, including the wharf, demised to *Veasey* by the indenture of 10th *September* 1834, and assigned by him by the indenture of 19th *December* 1839), "to have and to hold the said messuage, wharf, land and premises hereby assigned, or intended so to be, with their appurtenances, unto the said *E. Raper*, his executors, administrators and assigns for the residue now to come and unexpired of the said term of twenty seven years and a half as aforesaid wanting one day, nevertheless redeemable and subject to the provisoes, declarations and powers hereinafter contained." The indenture further witnessed that, "in further pursuance of the said agreement, and for the considerations hereinbefore expressed," *W. Bonfield* and *T. Bonfield*, and each of them, had granted, bargained, sold, assigned, transferred and set over, and by those presents did grant, &c., to *E. Raper*, his executors, &c., all and singular the stock, goods, &c., upon the wharf and premises, and all other their joint stock and effects, wherever situate, and all debts owing to them, and all other moneys, furniture, personal estate, &c., whatsoever, of *W. Bonfield* and *T. Bonfield*, and all the estate, right and property, at law and in equity, of *W. Bonfield* and *T. Bonfield*, and each of them, in the same; habendum to *E. Raper*, his executors, &c., with power to sue and give receipts; "but, nevertheless, redeemable and subject to the provisoes and declarations hereinafter contained concerning the same. Provided always, and it is hereby declared and agreed, that the said leasehold pre-

mises, goods, chattels and effects of the said *W. Bonfield* and *T. Bonfield* are respectively underleased and assigned to the said *E. Raper*, his executors, administrators and assigns, for the purpose of saving harmless and keeping indemnified the said *E. Raper*, his heirs, executors and administrators from all liability and loss which may occur to the said *E. Raper*, his heirs, executors, administrators and assigns, by his having so become surety for the said *W. Bonfield* and *T. Bonfield* in the hereinbefore recited bonds and note of hand to the said *R. Warner*, *S. Goodman* and *G. G. Day*, respectively, as aforesaid. And, therefore, if the said *W. Bonfield* and *T. Bonfield*, or either of them, shall well and truly pay or cause to be paid the said several principal sums and interest for which the said *E. Raper* has so become bound as surety as aforesaid, and shall well and duly save harmless and keep indemnified the said *E. Raper*, his heirs, executors, administrators or assigns, and his estate and effects, from all loss, costs, charges, damages and expenses on account thereof, and fully exonerate him from all liability in respect of the same, then these presents, and every clause, article, condition and thing herein contained shall cease and be void. Provided also, nevertheless, and it is hereby further agreed and declared, that, in case the said *E. Raper*, his heirs, executors or administrators, shall at any time or times hereafter, in respect of his so having become bound for the said *W. Bonfield* and *T. Bonfield* as surety as aforesaid, bear, sustain, expend, be put unto or pay any sum or sums of money, loss, costs, charges, damages and expenses, for or by reason or on account of the same, or for or by reason or on account of any action, suit or other proceeding, claim or demand, which shall

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or may be brought, had, commenced, prosecuted or made in respect or by force or means of any of the said securities in which the said *E. Raper* has so joined as surety as aforesaid, or for the receiving or compelling payment of the said several sums of money or any of them, or any part thereof, then, and in such case, and from time to time as often as the same shall happen, it shall be lawful for the said *E. Raper*, his executors," &c., "without any further power or other authority or direction of, from or by the said *W. Bonfield* and *T. Bonfield*, by and out of the debts, moneys and profits of the said business hereinbefore assigned, or by the rent to be derived from the said premises, or by mortgage or absolute sale of all or any of the chattels, effects and premises hereby assigned, by public auction or private contract, in such manner as the said *E. Raper*, his heirs, executors, &c. "shall think proper, levy and raise such sum and sums of money, loss, costs, charges, damages and expenses, as he or they, or any of them, shall bear, pay," &c. "as aforesaid, together with interest at the rate of 5*l.* per cent. per annum on all such sum and sums of money and expenses as aforesaid, from the time, or respective times, at which the same shall be respectively paid, advanced or incurred by the said *E. Raper*, his heirs, executors," &c. "and also the costs, charges and expenses which shall or may be incurred in the carrying the powers of this deed into execution. And the said *E. Raper*, for himself, his heirs," executors, administrators, and assigns, doth covenant with the said *W. Bonfield* and *T. Bonfield*, their executors," &c., "that, in case the moneys due on the said several herein before in part recited bonds and note to the said

R. Warner, S. Goodman and G. G. Day as aforesaid, and all interest due thereon, shall be duly paid off, satisfied and discharged by the said *W. Bonfield* and *T. Bonfield*, their executors," &c., "without calling upon the said *E. Raper* as such surety as aforesaid, that he the said *E. Raper*, his heirs," &c., "will, upon the same being delivered up to him to be cancelled, reassign and release the premises and other effects which have been hereby assigned for the purpose of indemnifying the said *E. Raper*, his heirs," &c., "from loss on account of his so becoming surety as aforesaid, unto the said *W. Bonfield* and *T. Bonfield*, their executors," &c. "And the said *W. Bonfield* and *T. Bonfield* do, for themselves, severally and respectively, and for their several and respective heirs, executors and administrators, covenant with the said *E. Raper*, his heirs, executors, administrators or assigns, that they, the said *W. Bonfield* and *T. Bonfield*, their heirs," &c., "respectively, some or one of them, shall and will, from time to time, and at all times hereafter, save, defend, keep harmless and indemnified the said *E. Raper*, his heirs, executors, administrators and assigns, and his, their, and every of their, lands and tenements, goods and chattels, of, from and against the said bonds and note of hand so given and executed to the said *R. Warner, S. Goodman and G. G. Day* as aforesaid, and of, and from and against, all actions, suits, causes of action and suit, claims and demands, whatsoever, on account or in respect of the same or in anywise relating thereto." Covenant by *W. Bonfield* and *T. Bonfield* for further assurances. "In witness" &c. Signed and sealed by *W. Bonfield, T. Bonfield*, and the defendant *E. Raper*.

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This deed was stamped with a deed stamp of 1*l.* 15*s.*, and a following stamp of 1*l.* 5*s.* It was not disputed, on the part of the plaintiff, that the deed comprehended the premises in question. But it was objected that there ought to have been a mortgage stamp upon it of at least 8*l.*, inasmuch as the sum secured was the aggregate of the sums in the conditions of the bonds and the promissory note, namely 3500*l.*: and that the deed was therefore not admissible in evidence. The learned Judge was of opinion that the deed was not a mortgage: and he admitted it in evidence, and directed a verdict for the plaintiff on the first two issues, and for the defendant on the third.

In *Easter* term 1852, *Ogle* obtained a rule nisi for a new trial, on the ground of improper admission of evidence. In the last *Trinity* vacation (*a*),

Joseph Brown shewed cause. The deed is a deed of indemnity. There is no such head in stat. 55 *G.* 3. c. 184., the statute in force at the time of the execution; but the deed is properly stamped with 1*l.* 15*s.* as a deed "not otherwise charged" in the Schedule, Part I., title *Deed*; with the follower of 1*l.* 5*s.* in respect of the number of words. It is not a mortgage. None of the subdivisions under the head *Mortgage*, in the Schedule, Part I., corresponds with this deed. It is not "made, as a security for the payment of any definite and certain sum of money, advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable." Nothing has been advanced by the supposed mortgagee; he has merely

(*a*) June 18th. Before Lord Campbell C. J., Coleridge, Erle and Crompton Js.

entered into a contract with third parties who have made the advance to the supposed mortgagors. Nor is the deed within the description in the subdivision following: "where the same respectively shall be made as security for the repayment of money, to be thereafter lent, advanced or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be." The loan, or advance or payment, there spoken of, must be a loan, &c. by the mortgagee to the mortgagor, or at any rate on the mortgagor's behalf. There is nothing like an account current. Nor is the deed within the words "if the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit," or "shall be limited not to exceed a given sum." In *Wroughton v. Turtle* (a) leasehold premises were mortgaged for a sum advanced: the original lease contained a covenant by the lessor to renew the lease at the costs of the lessee: and the mortgage deed contained a covenant that, if the mortgagor did not procure renewals of the lease, the mortgagee might do so, and the expense of so doing should be a charge on the premises, which should not be redeemable till the expense was repaid by the mortgagor to the mortgagee: and it was held that the deed might be stamped as a simple mortgage for the original sum advanced, and that it did not require any stamp in respect of the contingent expense of the renewals, as "uncertain and without any limit." The contingent charge therefore, if standing alone, would not have made a mortgage stamp necessary. There *Parke* B. relied on the principle that "Every charge on the

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(a) 11 M. & W. 561.

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subject must be imposed by clear unambiguous words." *Laurance v. Boston* (a) is to the same effect. No sum secured by this deed is "ultimately recoverable thereupon:" the grantors do not covenant to pay to the grantee any sum at all, but only to indemnify. They would satisfy this by paying the obligees of the bonds, and the holder of the promissory note. If the defendant had paid the money, he could not sue the grantors as for a debt to himself. [*Crompton J.* It is not said on the other side that he could do so on this deed; but that the payment would create a simple contract debt, and he might then sue in assumpsit for money paid.] That action would be defeated by the production of the deed. In *Baber v. Harris* (b) it was held that, where a lessee assigned his lease by deed containing the word "grant," the assignee, on being compelled by the superior landlord to satisfy a distress for rent due before the assignment, might maintain covenant for indemnification against the assignor, though there was no express covenant for indemnity, as here; and that he could not sue in assumpsit for the sum so paid in satisfaction. [Lord Campbell C. J. You can hardly call this a case of merger: it is not a contract under deed to pay the sum for which the supposed action of assumpsit is to be brought.] It is not precisely a merger, any more than there was a merger in *Baber v. Harris* (b). That case is in accordance with *Schlenker v. Mozzy* (c) and with the language of Cresswell J. in *Edwards v. Bates* (d). The remedy therefore of the defendant, on this deed, would be simply an action of covenant against the grantors for not indemnifying, which gives the deed a

(a) 7 Esch. 28.

(b) 9 A. & E. 532. See *Yates v. Aston*, 4 Q. B. 182.

(c) 3 B. & C. 789.

(d) 7 M. & G. 590, 600.

character altogether different from that of a mortgage. Such a claim could not be proved against the estate of the grantors, if they became bankrupt. Nor could the payment be set off in an action brought by the grantors against the defendant. [*Erle J.* Does not your argument go this length, that a deed, otherwise a mortgage, would cease to be so by its containing a covenant to indemnify?] Perhaps the deed might then be stamped as a "deed" "not otherwise charged:" or, more probably, two stamps would be necessary. [*Crompton J.* referred to *Watson v. Macquire (a)*.] It is believed that the opinion of conveyancers is that such a deed as this is not a mortgage.

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Ogle and *J. G. Malcolm*, contra. This deed is a mortgage in both the technical and the popular sense of the word. Its effect is to convey land which is to be held as a security for a pecuniary outlay, and to be reconveyed on the repayment of such outlay. That description includes a mortgage. And whether the pecuniary outlay precedes or is to follow the execution of the deed makes no difference: the Schedule, Part I., expressly includes the case of "repayment of money, to be thereafter lent, advanced the deed or paid." The defendant uses as an actual underlease; and, as against him, it must be presumed that he has paid the money and not been repaid. *Baber v. Harris (b)* is inapplicable. There the plaintiff had paid a sum for which the defendant was liable: but, as between the plaintiff and the defendant, no liability arose except upon the conveyance; which conveyance, by virtue of the word "grant," included a covenant to repay. Money had been paid in consideration, among other things, of the covenant for quiet enjoyment. But here the liability of the grantor to repay the defendant such

(a) 5 Com. B. 836.

(b) 9 A. & E. 532.

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sums as the latter might have to pay as surety for the plaintiff existed independently of the deed, and might have been enforced by an action of assumpsit for money paid, if the deed had never existed. This makes the relation between the parties that of debtor to creditor; and therefore the case falls within the class which *Parke B.*, in *Wroughton v. Turtle* (a), considered to be comprehended in the Schedule, Part I., tit. *Mortgage*. And, as was pointed out in the argument on the other side, the deed contains no covenant to repay: so that there is nothing to supersede the original liability. And the payment of the money by the defendant to the obligees or the holder of the promissory note is a loan, advance or payment for the grantors, within the meaning of the Legislature. It is no answer to say that the indemnification covenanted for by the grantors might have been effected without pecuniary payment by them.

Cur. adv. vult.

Lord CAMPBELL C. J., in this term (*November 11th*), delivered the judgment of the Court.

In this case the question is, whether an assignment of chattels to secure to the assignee an indemnity in case he should be called on to pay the amount secured by a bond which he had entered into as surety for the assignor, is a mortgage liable to an ad valorem stamp. Is it an assignment to secure "the repayment of money, to be" "lent, advanced or paid" at a future time?

If the debt of the principal is paid by the surety, the amount of that debt is so much money paid for that principal. If the defendant had bound himself absolutely to pay the debt of the principal at a future time, and the assignment had been made to repay what he

(a) 11 M. & W. 568.

should so pay, the instrument would be clearly within the words of the statute. And, although he bound himself to pay only in case the principal made default, still the assignment was to secure repayment of money to be paid at a future time, in case of that contingency happening. A security for contingent future payments is as much within the words and meaning of the statute as a security for certain future payments. In *Watson v. Macquire* (a) the assignment was in effect the same as in the present case. *John Watson* was indebted in 600*l.* to *Mrs. Sabin*: *Henry Watson*, the plaintiff, was bound to *Mrs. Sabin* in 600*l.* as surety for *John*: *John* gave *Henry* a counter-bond for 600*l.*, to indemnify him in case he should be obliged to pay *Mrs. Sabin* 600*l.*; and upon this bond of *John* to *Henry* the ad valorem duty of 5*l.* was paid. *John* also gave to *Henry* the assignment in question as an additional security for the same 600*l.* as had been secured by the bond of *John*. It was assumed, throughout, that the assignment was a mortgage requiring an ad valorem stamp, and that it was within the exemption of the statute for additional securities, provided the ad valorem stamp of 5*l.* on the bond was sufficient. The objection relied upon was that the assignment secured 600*l.* and interest, and was therefore for an indefinite sum, and required a 25*l.* stamp; and this objection was overruled. The judgment in effect decides that an ad valorem stamp was necessary, but that the 5*l.* paid on the bond of *John* to *Henry* was sufficient for the additional security in question.

We are therefore of opinion that an ad valorem stamp for a mortgage was necessary.

Rule absolute.

(a) 6 Com. B. 836.

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LEAING, *against* The YORK and NORTH MID-
LAND Railway Company.

Per Lord
Campbell C. J.,
and Crompton J.:

MANDAMUS (*November 17th 1851*).

Whereas, by a certain act &c. (9 & 10 *Vict.*

When a Railway Company have obtained an act of Parliament, reciting that the formation of a railway from *A.* to *D.* will be beneficial to the public and that the Company are willing to execute it, and giving them compulsory powers upon landholders for that purpose, and the Company, in exercise of the powers, have taken lands and thereupon made part of their line, they are bound by law to complete such line, not only to the extent to which they have taken lands, but to the farthest point. Although the statute enacts only that "it shall be lawful" for them to make the railway.

And although the uncompleted portion, from *B.* to *C.*, is a line substituted by a later statute for the line marked out between the same points by the original act.

Mandamus lies to compel the entire completion, at the instance of a landholder whose land has been required, or is prejudiced by the non-completion.

And, if, by the expiration of powers, it has become impossible to finish the line up to the original terminus, a mandamus lies nevertheless to complete it up to the point at which the practicability ceased.

It is not a good return, that the line of which the completion is demanded has become superfluous, or from the circumstances of the district would be inconvenient, or would not remunerate the Company:

Nor that the funds which can in reasonable probability come to the possession of or be disposable by the Company will fall short by 100,000*l.* of the sum required to make the railway authorized by their Act, and which the writ commands them to make.

Semble, however, that, if there appeared an entire failure of funds from unforeseen casualties, and without imprudence or bad faith in the Company, the Court, in its discretion, would refuse a mandamus.

And that absolute want of funds, or of means to obtain them, might be returned to the writ.

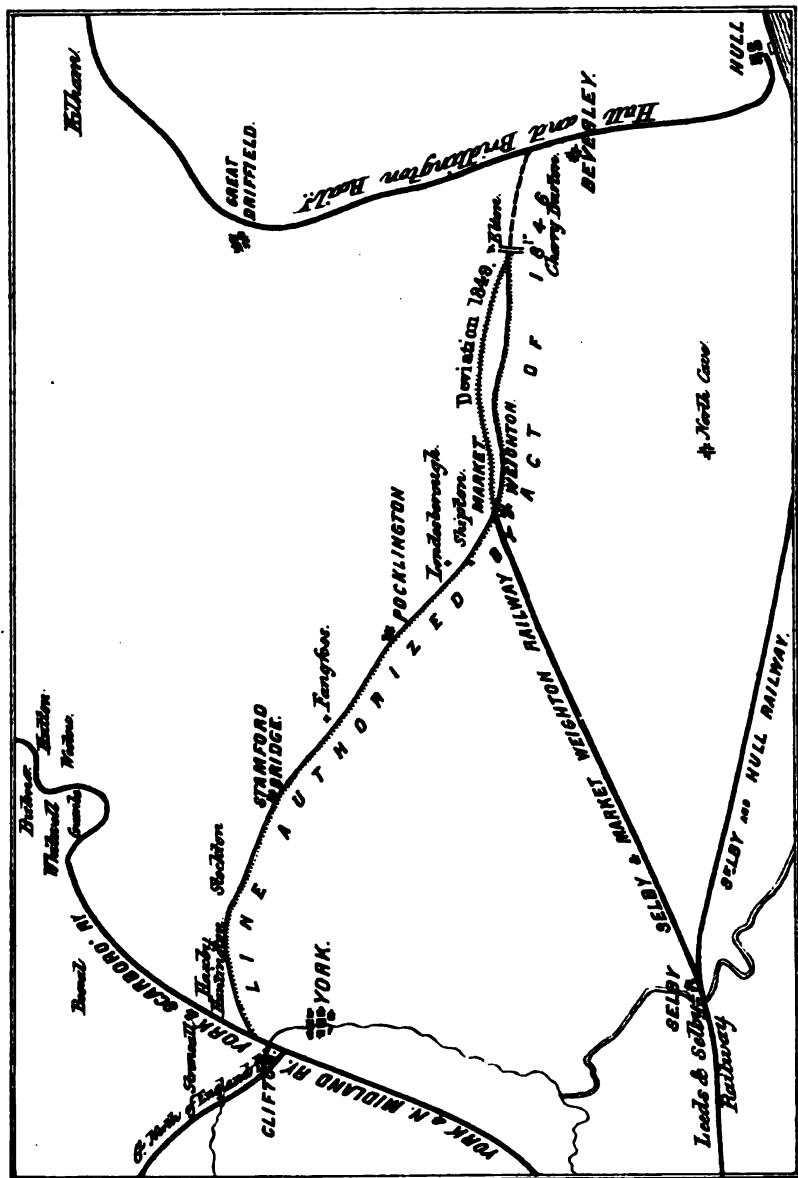
Held by *Erle J.*: That a statute using permissive words as above does not of itself oblige the Company to complete their line.

And that, if, under such a statute, they have exercised a compulsory power of taking lands, they are not therefore obliged to complete the line any farther than such power has been exercised.

(a) Local and Personal, public. Royal Assent 18th June 1846.

(b) Local and Personal, public. Royal Assent 21st June 1836.

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The line marked thus from York to near Broomley is the one authorized by the Act of 1846.
 The line marked thus from Market Weighton to the Selby & Cherry Burton Road is the one authorized by the Act of 1846.
 The line marked thus from the Selby & Cherry Burton Road to the junction with the Hull & Brixington Road is the part for which the Company have for purchasing lands been empowered.

Altofts, with various branches of railway, all in the West Riding of the county of *York* or county of the said city," "whereby several persons became and were incorporated by the name of *The York & North Midland Railway Company*; and also reciting that the provisions of the said Act had been amended and enlarged by several subsequent Acts relating to the said Company, passed respectively in the first, fourth, seventh, eighth and ninth years of Her Majesty's reign; and that "it would be attended with local and public advantage" if a railway were formed from the line of *The York and Scarborough Railway* (a) at or near the city of *York* to *Beverley* in the *East Riding* of the county of *York* by way of *Stamford Bridge*, *Pocklington* and *Market Weighton*, and also a railway or railways from the *Bridlington* Branch of *The Hull & Selby Railway* to the *East Riding Dock* at or near *Kingston upon Hull*; and that *The York & North Midland Railway Company* were "willing to execute the same," but that such objects could not be attained without the authority of Parliament: It was enacted (b) that all the provisions contained in the first recited act (6 & 7 W. 4. c. lxxxi.) or in any act subsequently passed relating to *The York and North Midland Railway*, so far as the same were applicable and then in force, and except such of them as were by the now reciting act repealed, altered, &c., should extend to the now reciting act and to the several purposes thereof, and to the matters &c. thereby authorized to be done, as fully as if reenacted in the said act in reference to such purposes, &c., and the said acts and the now reciting act should be con-

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(a) See the annexed plan, which is a copy of one used on the argument of this case.

(b) Sect. 1.

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strued and read together as forming one act: And by the first mentioned act (9 & 10 *Vict. c. lxx.*) it was enacted (a) that so much of the Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c. 20.*), and of the Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c. 18.*), as was applicable to and not modified by or inconsistent with this act or the said acts relating to *The York and North Midland Railway* should be held to apply to the works authorized by the now reciting act, and be read as forming part thereof; and that in citing this act it should be sufficient to refer to it as "The York & North Midland (East Riding Branches) No. 1. Railway Act, 1846:" And by this act, after further reciting that the Company were authorized by their acts of Parliament to raise 2,072,265*l.* by the creation of shares or stock, and by mortgage of their undertaking, and to convert borrowed moneys into capital, and to create shares for the purpose of paying off, or in lieu of borrowing, moneys, and that they had created shares for the purpose of paying off moneys borrowed on the credit of their undertaking, and that their nominal capital in shares or stock amounted to 2,072,265*l.*, of which more than half had been paid up, it was enacted (b) that it should be lawful for the Company to borrow, on the credit of their undertaking and the revenues thereof, sums &c. within a certain limit, specified by the act: (then followed certain provisions with respect to present and future mortgages): And (c) that the Companies Clauses Consolidation Act, 1845, (8 & 9 *Vict. c. 16.*) should be held applicable to the borrowing of moneys under this act and the conversion of such moneys into capital:

(a) Sects. 2, 32.

(b) Sect. 3.

(c) Sect. 5.

And by this act, 9 & 10 *Vict. c. lxxv.*, after reciting that plans and sections of the railway thereby authorized to be made, shewing the lines and levels, and also books of reference containing the names of the owners &c. of the lands through which the same were intended to pass or be made, had been deposited with the clerks of the peace &c., it was enacted that, subject to the provisions in this act and the Lands and Railways Clauses Consolidation Acts contained, it should (a) be lawful for the Company to make and maintain the said railways and works in the lines and upon the lands delineated in the said plans and described in the said books of reference, and to enter upon, take and use such of the said lands as might be necessary for such purpose; and also (b) that the lines of railway to be made under the authority of the said act should be the following (that is to say): A railway commencing in the township of *Clifton* and parish of *Saint Olave Marygate* in the *North Riding* of the county of *York* by a junction with the line of *The York and Scarborough Railway* belonging to *The York & North Midland Railway Company*, thence passing from, in, through or into the several parishes, townships and extra-parochial or other places following, or some of them, that is to say, *Clifton*, &c. (other places were here enumerated), *Market Weighton*, &c., *Elton*, &c., *Cherry Burton*, *Rishop Burton*, *Molescroft* and *Beverley* &c., all in the *East Riding* &c., and terminating by a junction with the line of the *Bridlington* branch of *The Hull and Selby Railway* in the township of *Molescroft* &c.: Also a railway &c. (describing a line to commence by a junction with the said *Bridlington* branch,

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(a) Sect. 7. "It shall be lawful for the said Company to make and maintain" &c.

(b) Sect. 8.

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and to terminate at or near an intended dock to be called *The Victoria Dock*, at *Kingston upon Hull*): Also a railway &c. (describing a third line, to commence by a junction with the said *Bridlington* branch, and terminate in the township &c. of *Collingham* by a junction with the railway to the said *Victoria Dock*): And it was further enacted (a) that the powers of the Company for the compulsory purchase of lands for the purposes of the same act should not be exercised after the expiration of three years from the passing of that act, and that the railways by the said act authorized should be completed within five years from the passing of the said act, and, on the expiration of such period, the powers, by the said act or the acts incorporated therewith or extended thereto, granted to the Company for executing the same railways, or otherwise in relation thereto, should cease to be exercised, except as to so much of such railways as should then have been completed, and except such powers as were by the same acts or any of them declared to be continued for a longer period: And by the same act it was also enacted &c. (clause (b) enabling the Company to take such tolls for conveyance &c. on the railways authorized by this act to be made, as they were empowered to receive under a former act, which was referred to, on the railways thereby authorized).

And whereas by another act (12 & 13 *Vict. c. lx.*, local and personal, public(c)), "For enabling *The York & North Midland Railway Company* to divert their railways between *Market Weighton* and *Beverley* and *Copmanthorpe* and *Tadcaster*, all in the county of *York*; and for other purposes," after reciting (d) the act 6 & 7 *W. 4. c. lxxxii.* (before referred to), and that the same had been

(a) Sects. 21, 22.

(b) Sect. 23.

(c) Royal Assent, 13th July, 1849.

(d) Sect. 1.

amended by subsequent acts, and that, by the *York & North Midland* Act of 1846, the Company were authorized to make a railway from *The York & Scarborough Railway* near the city of *York* to or near to *Beverley*, part of which railway, namely from *York* to *Market Weighton*, had then already been made and opened to the public, and that "it would be of advantage" if part of the said line between *Market Weighton* and *Beverley* were diverted, and if the part rendered unnecessary by such diversion were abandoned; and that the said Company were willing to make such diversion; it was enacted (a) &c. (Lands and Railways Clauses Consolidation Acts incorporated, so far as consistent); and that all the provisions in the act 6 & 7 W. 4. c. lxxxi. or any subsequent act relating to *The York & N. M. Railway*, so far as they were applicable and in force and not repealed, altered &c. by this act, and not inconsistent with the Lands and Railways Clauses Consolidation Acts, should extend to the now reciting act, and the purposes thereof, and the matters and things thereby authorized to be done, as fully and effectually as if reenacted therein in reference to the said purposes &c., and should be construed and read with the said acts and this act, as forming one act; and (b) that, in citing this act, it should be sufficient to describe it as "The York and North Midland Railway Act, 1849:" And by the last mentioned act, after further reciting &c. (recitals as in the preceding act, as to deposit of plans, sections and books of reference), it was further enacted (c) that, subject to the provisions of this act and the Lands and Railways Clauses Consolidation Acts, it should "be lawful for you the said Company to make and maintain the said rail-

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(a) Sects. 1, 2.

(b) Sect. 34.

(c) Sect. 3.

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ways and works," with all proper conveniences thereto in the lines and upon the lands delineated on the said plans and described in the said books of reference, and according to the levels described on the said sections, and to enter upon, take and use such of the said lands as should be necessary for such purposes or any of them: And that (a) one of the lines of railway to be made under the authority of this act (being the line first in the act described) should be the following: viz. A railway commencing by a junction with the present authorized line of the said *East Riding Branches, No. 1., Railway* at or near the East end of the passenger platform of the *Market Weighton* passenger station in the township and parish of *Market Weighton, &c.*, belonging to and in the occupation of *The York & North Midland Railway Company*, thence passing from, in, through or into the several parishes, townships and extraparochial or other place following, or some of them: viz. *Market Weighton, Goodmanham, Elton and Cherry Burton*, all in the said *East Riding*, and terminating by a junction with the present authorized line of the said *East Riding Branches, No. 1., Railway* at or near a public highway leading from *Elton* to *Cherry Burton* in the township and parish of *Cherry Burton* aforesaid, and which highway is numbered 2. on the plans deposited &c. and referred to by the *East Riding Branches, No. 1. &c. Act*: And it was further enacted (b) &c.; clauses, as in the preceding act (antè, p. 182), for cessation of powers of compulsory purchase for the purposes of this act in three years, and for completion of the railway by this act authorized, and cessation of powers relative thereto in five years: And it was by this act (of 1849) further

(a) Sect. 4.

(b) Sects. 9, 10.

enacted (a) that the time limited by the act of 1846 for the compulsory purchase of the lands thereby authorized to be taken for the purposes of that act should, in regard to the lands required for so much of the railway authorized by the last mentioned act to be made from *The York and Scarborough Railway* near *York* to or near to *Beverley* "as lies between the point on the same railway near the said public highway leading from *Elton* to *Cherry Burton* in the said township and parish of *Cherry Burton* aforesaid, at which the first mentioned railway by" the now reciting "act authorized" would "terminate, and the termination of the said authorized line of railway at or near to *Beverley*," be, and the same was thereby, extended and enlarged for the further term of two years; and the time for the execution and completion of this portion was extended for the further term of five years; both periods to be computed from the passing of the now recited act: And it was further enacted by the same act (of 1849) (b); power to take tolls for conveyance &c. on the said railways, subject to the provisions of this act and of *The Hull and Selby Railway Purchase Act, 1846* (c) (with an exception not material), and (d) the provisions (applicable to this subject) of the *Railways Clauses Consolidation Act, 1845*; And further &c.; power (d) to apply moneys raised or to be raised under the act 9 & 10 *Vict. c. lxxv.*, and another act of 9 & 10 *Vict.* relative to *The York and North Midland Railway*, to the purposes of this act: And it was by the said act 12 & 13 *Vict. c. lx.* further enacted (e) that the said Company should abandon and

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(a) Sect. 11.

(b) Sects. 14, 17.

(c) 9 & 10 *Vict. c. ccxli.*, local and personal, public.

(d) Sect. 18.

(e) Sect. 19.

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relinquish the construction of the following portion of their line of the said East Riding Branches, No. 1., Act, namely so much of the said *East Riding Branches No. 1. Railway* as was authorized to be made by the York & North Midland (East Riding Branches) No. 1. Railway Act, 1846, and lies between the said east end of the said platform of the *Market Weighton* passenger station in the township &c. of *Market Weighton* aforesaid and the said public highway leading from *Elton to Cherry Burton* numbered 2. &c., in the township &c. of *Cherry Burton* aforesaid; and that, from and immediately after the passing of the now reciting act, all the powers and authorities granted by the said York & N. M. (East Riding Branches) No. 1. Railway Act, 1846, for making and maintaining the portion of the said *East Riding Branches No. 1. Railway* thereby authorized to be abandoned should cease and determine.

The writ, after these recitals, proceeded as follows.

And whereas We have been given to understand &c. that, although a reasonable time for you the said Company to have proceeded to make, and to have made and completed, the hereinbefore mentioned line of railway authorized by the said York & North Midland Railway Act, 1849, and therein firstly described as aforesaid, has long since elapsed, yet that you have not, since the passing of the said act, done or taken any step or steps, act or acts, either as to the purchase of land or otherwise for making or completing the same, or commencing to make or complete the same; but, on the contrary, that you have abandoned all intention to make and complete the same or any part thereof: And whereas We have been given to understand &c. that *David Burton*, at the time of the passing of the said

York & N. M. (East Riding Branches) No. 1. *Railway Act*, 1846, was, and still is, owner of lands and other hereditaments situate in the said parish of *Cherry Burton*, in the *East Riding* of the county of *York*, through which the railway in the last mentioned Act firstly as hereinbefore recited described was by the last mentioned act authorized to be made and pass, and that the last mentioned line of railway, as laid down and delineated in the plans next hereinafter mentioned, intersected his said lands and other hereditaments, as well at that part thereof which by the said York & N. M. Railway Act, 1849, was authorized to be abandoned as at that part thereof for the making of which the time was extended as hereinbefore mentioned, and that the said lands and tenements are respectively shewn on the plans in that behalf deposited with the respective clerks of the peace as in the said York & N. M. (East Riding Branches) No. 1. Railway Act, 1846, mentioned, and that the name of the said *David Burton* is contained in the books of reference to the said plans so deposited as aforesaid: and further that the said *D. Burton*, at the time of the passing of the said York & N. M. Railway Act, 1849, was, and still is, owner of other lands and hereditaments situate in the said parish of *Cherry Burton* in the said *East Riding*, through which the before mentioned line of railway in the last mentioned Act firstly described was thereby authorized to be made and pass, and that the last mentioned lands and tenements are respectively shewn in the plans in that behalf deposited &c., as in the said act is mentioned, and that the name of the said *D. B.* is contained in the books of reference to the said plans so deposited &c.: And whereas We have also been given to understand &c. that *John Leaing*, at the time

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of the passing of the before mentioned acts respectively (of 1846 and 1849), was and still is owner of lands and tenements situate in the aforesaid township and parish of *Market Weighton* through which the said railway in the said York & N. M. (East Riding Branches) No. 1. Railway Act, 1846, firstly as above described was by the said last mentioned act authorized to be made and passed, and that his said lands and tenements are respectively shewn on the plans &c. deposited &c. as in the said act is mentioned, and that the name of the said *J. L.* is contained in the books of reference &c., and that a portion of the said lands and tenements of the said *J. L.* which you were by the said act authorized to take were required by and were duly conveyed and assured to you the said Company, and were taken and used by you for the purposes of the last mentioned railway under the authority of the said act and the other acts incorporated therewith or extended thereto, and that the remaining portion of his said lands and tenements adjoining the lands and tenements so taken by you as aforesaid are much lessened in value by reason of the non-completion of the said line of railway : And whereas We have further been given to understand &c. that the portion of the line of railway authorized by the said York & N. M. (East Riding Branches) No. 1. Railway Act, 1846, for the making of which the powers of you the said Company for the compulsory purchase of lands were by the said York & N. M. Railway Act, 1849, extended and enlarged as aforesaid for the further term of two years, is of the length of three miles or thereabouts, and, further, that the said *D. Burton* and *J. Leaing* are desirous that the hereinbefore mentioned line of railway authorized by the said York & N. M. Railway Act, 1849, and firstly therein described, should be

made and completed, and that the making and completion of the same would be of great public advantage by affording to the inhabitants of the said towns of *Beverley* and of *Cherry Burton*, *Elton*, and the surrounding districts, means of speedy and easy communication with *York* and the North of *England*, and *Selby* and the West of *England*, and the inhabitants of the districts intervening between *Market Weighton* and *Cherry Burton* aforesaid means of speedy and easy communication with *Beverley* aforesaid and with *Hull*, *Driffield*, *Bridlington*, *Scarborough*, *Whitby* and *Malton*: and although the said *D. Burton* and *J. Leaing* have duly required you to do and take all necessary acts and steps, both as to the purchase of lands and otherwise for making and completing the last mentioned line of railway: Yet you, not regarding your duty in that behalf, nor the said statutes, have absolutely refused and neglected, and still do refuse &c., to make and complete the said line or any part thereof, or to take or commence any steps or acts, step or act for that purpose, to the great damage and injury of the said *D. Burton* and *J. Leaing*, as We have been informed from their complaint made to Us; whereupon they have besought Us that a fit and speedy remedy may be applied &c. Now We, being willing &c., do command you &c.: That, immediately after the receipt of this Our writ, you do proceed to purchase the lands necessary to, and required for, the making and completing of the said line of railway by the said *York & N. M. Railway Act*, 1849, authorized to be made, and firstly therein described as aforesaid, and proceed to make, and do make, and complete, the said line of railway, pursuant to the provisions of the last mentioned act and of the acts therein incorporated in that behalf contained; or that you shew Us cause &c.

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Return. We, &c., do certify and return &c.: That the annexed writ came to us on the 24th day of *December*, A.D. 1851, and not before: And that the period by the York & North Midland (East Riding Branches) No. 1. Railway Act, 1846, limited, and by the York & North Midland Railway Act, 1849, extended, as in the said writ mentioned, for the compulsory purchase of the lands by the York & N. M. &c. Act, 1846, authorized to be taken for the purposes of that act, so far as relates to the lands required for the purposes of so much of the railway by the last mentioned act authorized to be made from the *York & Scarborough* railway near the city of *York* to or near to *Beverley* as lies between the point on the same authorized railway near the said highway leading from *Elton* to *Cherry Burton* and the termination of the said authorized line of railway at or near to *Beverley*, and which is of the length of three miles as is stated in the annexed writ, expired before the issuing of the annexed writ, namely on 13th *July* A.D. 1851; and that no part of such portion of the said railway by the said last mentioned act authorized to be made as lies between the point on the same authorized railway near the said highway leading from *Elton* to *Cherry Burton* and the termination of the said authorized line of railway at or near to *Beverley* aforesaid was, before the coming of the annexed writ to us, nor hath been, made; and that no part of the lands required, and by the last mentioned act authorized, to be taken for the purposes of the last mentioned portion of the last mentioned authorized railway was, before the coming of the annexed writ to us, nor hath been, purchased or taken by or on behalf of us the said Company: and that no agreement, negotiation or treaty has ever been made or entered into, or notice given, or any other step taken by or on behalf of us the

said Company for the purchase, acquirement or possession of any part of the lands required and by the last mentioned act authorized to be taken for the purposes of the last mentioned portion of the last mentioned authorized railway: and that we the said Company, at the time of the coming &c., had not, nor have we, any power or authority to purchase or take any portion of such last mentioned lands; and we the said Company could not, at the time of the coming &c., nor can we, make the last mentioned portion &c., or any part thereof: and that the purchasing or acquiring, or taking or getting possession of, the last mentioned lands, and the making of the last mentioned portion &c. by us, was at the time of the issuing of the said annexed writ to us, and from thence hitherto hath been, and still is, impracticable and impossible: And that the said line of railway by the said York & N. M. Railway Act, 1849, authorized to be made, and which we the said Company are by the annexed writ commanded to make, is a mere diversion or deviation of an integral part of the said railway by the said York & N. M. &c. Act, 1846, authorized to be made as aforesaid: And that the point on the same railway near to the said highway is not the site of any town or village, and is three miles from the town of *Beverley* aforesaid, which is the nearest town to the said point, which is much too far from *Beverley* aforesaid to be adapted for the site of a station for that town; and that a station built there would be a very inconvenient station for the inhabitants of *Beverley* and for persons travelling to and from that place along the proposed railway, which we are commanded to make: And that *Cherry Burton* is a small and inconsiderable village: and that the population of *Cherry Burton* and

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the districts next around the same point and *Cherry Burton* is very small and inconsiderable; and that the tolls and other charges to be derived from traffic along the same railway, if made, would not only not be remunerative to the said Company, but would be insufficient to pay the necessary costs of conveying such traffic and of maintaining the same railway: and that the making of the same railway would be a useless expenditure of labour and money, whilst it would be destructive of the lands through which it would go for any agricultural or other useful or beneficial purpose: and that the district between *Market Weighton* and *Beverley* in the annexed writ mentioned, through which the said railway we are thereby commanded to make would (if made) run, contains merely a few agricultural villages of very small extent and thinly populated: And that, at the time of the coming of the annexed writ to us, there were and are easy and convenient communications by railway from *Beverley* and *Market Weighton* aforesaid to *York* and the north of *England*, and between *Beverley* aforesaid and the several towns of *Hull*, *Driffield*, *Bridlington*, *Scarborough*, *Whitby* and *Malton* and all parts of *England* traversed by railway; and that the facilities of such communications, so far as the same relate to *York* and the north of *England*, will be increased by the opening of *The Malton & Driffield Junction Railway* and *The Malton & Thirsk Railway* respectively; and that the said *Malton and Driffield Junction Railway*, at the time of the coming of the annexed writ to us, was, and is already, made and completed, except a very small portion thereof; and that the said *Malton & Thirsk Railway*, at the time of the coming &c., was, and is now, in the course of construction: and that both the two

last mentioned railways will be made and opened for the use of the public in a much shorter period than the said railway from *Market Weighton* to *Beverley* could be constructed in, even if the powers of us the said Company to complete the same were still in force: And that all and every the sum and sums of money applicable to the purposes of the said York & N. M. &c. Act, 1849, which can in reasonable probability come to the possession of, or be disposable by, us the said Company will fall short by a very large sum of money, and not less than 100,000*l.*, of the aggregate sum necessary for the making of the railway authorized by the said York & N. M. &c. Act, 1849, and which we the said Company are by the annexed writ commanded to make, and necessary for the making of the same railway: And that, by reason of the premises, the making by us of the said railway authorized to be made by the said York & N. M. &c. Act, 1846, from the said *York & Scarborough Railway* near the city of *York* to or near *Beverley* in the said annexed writ in that behalf mentioned, with or without the said deviation by the said York & N. M. Railway Act, 1849, at the time of the issuing of the said annexed writ was, and is, impracticable and impossible: Wherefore we the said Company cannot, nor could we at the time of the coming of the annexed writ to us, nor were we then, nor are we, by law liable, or bound by the said acts in the annexed writ mentioned, or any of them, to proceed to purchase the lands necessary to and required for the making and completing of the said line of railway by the said York & N. M. &c. Act, 1849, authorized to be made and firstly therein described as aforesaid, or to proceed to make, or to make, or complete, the said line of railway in the said

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annexed writ in that behalf mentioned, and which we are thereby commanded to proceed to make, and to make and complete.

Demurrer. Joinder.

The demurrer was argued in *Trinity* term (*June* 2d.) 1852 (*a*).

Hugh Hill, for the Crown. This case must be governed by the principle laid down in *Blakemore v. The Glamorganshire Canal Navigation* (*b*), and adopted in *Regina v. The Eastern Counties Railway Company* (*c*), that persons who obtain acts of parliament like those in question contract with the public (represented by the Legislature) "to do and submit to whatever the Legislature empowers and compels them to do." The force and application of this principle are shewn also in *Lee v. Milner* (*d*), *Rex v. Cumberworth* (*e*), and *Rex v. Edge Lane* (*g*): it is recognised in *Regina v. Caledonian Railway Company* (*h*): and it prevails though the statute use permissive words only; *Com. Dig. Parliament* (R. 22.), *Rex v. Barlow* (*i*), *Regina v. St. Saviour's, Southwark* (*k*). *Macdougall v. Paterson* (*l*) is a late authority on the obligatory effect of the word "may." The facts appearing on this mandamus shew a contract with the public, and at all events with the persons whose lands are affected, to make a railway from the *York & Scarborough* line

(*a*) Before Lord Campbell C. J., Erle and Crompton Js. Coleridge J. was at Guildhall.

(*b*) 1 *Mylne & Keen*, 154. 162, 3. See the passage cited, p. 208, post.

(*c*) 10 *A. & E.* 531. 546.

(*d*) 2 *M. & W.* 824, 839, 40.

(*e*) 3 *B. & Ad.* 108.

(*g*) 4 *A. & E.* 723.

(*h*) 16 *Q. B.* 19.

(*i*) 2 *Salk.* 609.

(*k*) 7 *A. & E.* 925.

(*l*) 21 *Law J. N. S. Com. Pleas*, p. 27, *Mich. T.* 1851.

to *Beverley*; and the Company obtained their act by representing that the making of such a railway would "be attended with local and public advantage." It is also material that the Company here have begun the railway. *Patteson J.* says in *Regina v. London & North Western Railway Company (a)*: "If the Company begin to make the railway, then, possibly, they will be compelled to complete it; but not, if they have never begun" (*b*).

Hill then commented upon the statements in the return: and, as to the alleged want of funds, which he contended was no answer to the writ, he referred to *Regina v. The Trustees of the Luton Roads (c)*, and, generally, to the authorities on the same point cited in *Regina v. London & North Western Railway Company (a)*. The full notice of these points in the judgment of the Court makes it unnecessary to pursue the argument farther.

Sir *F. Kelly*, Solicitor General, *contra*. The mandamus calls upon the Company to complete a line which has never been commenced. The railway contemplated by the act of 1846, from *Clifton* to *Beverley*, has been completed as far as *Market Weighton*, and abandoned as to the portion from *Market Weighton* to the highway between *Elton* and *Cherry Burton*. Instead of this, a new line between *Market Weighton* and that high-

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(a) 6 Rail. Ca. 634. 644. Easter term, 1851. See p. 199, note (a), post.

(b) In the note of the reporters of the present case the dictum is: "If a Company obtain an act for making a railway, with the words 'it shall be lawful,' it may be they are not bound to make it: but it is another thing whether, if they begin it, they are not bound to make it according to the Act."

(c) 1 Q. B. 860.

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way was marked out by the act of 1849; and this was a distinct railway. But, supposing the new line to be the same, for the purposes of the case, as the line of 1846, the Company cannot be compelled to execute it even as far as the *Cherry Burton* road. It would now be impracticable to extend it farther; and to carry it only as far as that point would be an illegal exercise of the powers given by the act of 1846; *Regina v. The Eastern Counties Railway Company* (a). If the Company had been willing to do it, they might have been restrained by injunction; *Cohen v. Wilkinson* (b). Even the consent of the shareholders would not have justified it; *Macgregor v. Dover and Deal Railway Company* (c). *The East Anglian Railway Company v. The Eastern Counties Railway Company* (d) is to the same effect. No instance can be shewn of a mandamus to complete a railway in part, where it was impracticable to complete the whole.

The main question, however, is, whether an act authorizing a Company to make a certain railway obliges them to make it. Acts of this kind use obligatory language when it is intended that a duty should be prescribed, permissive where the intention is not such. Sects. 45, 46 of stat. 8 & 9 *Vict. c. 20.* (Railways Clauses Consolidation Act, 1845) are instances. There is the same diversity in the particular acts now in question (e). [Lord Campbell C. J. The question is, whether the statutory compulsion operates where the Railway Com-

(a) 10 *A. & E.* 531.

(b) 12 *Beav.* 125. 138. 1 *Macn. & Gord.* 481.

(c) *Ex. Ch.* Error from Q. B., *Trin. term*, (June 1st) 1852.

(d) 18 *Law Times*, 138. *Com. Pleas*, *Mich. Vac.* 1851.

(e) He referred to stat. 6 & 7 *W. 4. c. lxxxii. s. 93.*, and stat. 9 & 10 *Vict. c. lxxv. ss. 7, 10, 12, 13.* It is not thought necessary to set out the words.

pany have taken no step towards performing the work. That was lately raised in the House of Lords in *Sir W. C. Anstruther v. East of Fife Railway Company* (a), which is reported, very accurately as I am informed, in the *Law Times*.] *Rex v. Proprietors of The Birmingham Canal Navigation* (b) is an authority for the defendants on this point.

As to *Blakemore v. The Glamorganshire Canal Navigation* (c): the facts there differed totally from those of the present case: a canal had been made; and there was no doubt that an obligation, to some extent, was expressly imposed on the Canal company by statute (d). [Erle J. What is the advantage of calling the obligation in these cases contract rather than duty? The expression (e) has given rise to a whole line of argument on this subject.] The phrase does not seem accurate. The fact is merely that, in such cases, the Legislature grants a power, to be exercised under certain conditions. [Lord Campbell C. J. The fulfilment of a duty is more properly the subject of a mandamus than the fulfilment of a contract. The expression "contract with the public," which is often used, is metaphorical.] The correct language on the subject is that of *Alderson B.* in *Lee v. Milner* (g): "Those acts of Parliament have been called parliamentary bargains made with each of the landowners. Perhaps, more correctly, they ought to be treated as conditional powers given by Parliament to take the land of the different proprietors through whose estates

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(a) 19 *Law Times*, 130; *S. C.* 1 *Macqueen*, 98. (b) 2 *W. Bl.* 708.

(c) 1 *Mythas & K.* 154.

(d) See *Ibid.* p. 167.

(e) See the language of Lord Tenterden, to the same effect, in *Stour-bridge Canal Company v. Wheeley*, 2 *B. & Ad.* 792.

(g) 2 *Y. & Coll. Exch. Equity*, 611. 618, 9.

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the works are to proceed. Each landholder, therefore, has a right to have the powers strictly and literally carried into effect as regards his own land, and has a right also to require that no variation shall be made to his prejudice in the carrying into effect the bargain between the undertakers and any one else. This I conceive to be the real view taken of the law by Lord *Eldon* in the case of *Blakemore v. The Glamorganshire Canal Company (a)*;" on which *Alderson B.* then comments.

Regina v. The Eastern Counties Railway Company (b) was ultimately a decision, if not adverse, at least not favourable to the present mandamus. Lord *Denman* there, in his first judgment, applied the words of Lord *Eldon* to a state of facts on which they did not properly bear; and assumed the point in dispute when he said that the interference of the Court was occasioned by persons "refusing to proceed in some course prescribed by law." It is not certain that the Legislature always does contemplate the completion of these undertakings. The common clauses for cessation of powers shew the contrary. [Lord *Campbell C. J.* Do you say that a Company may complete part and abandon the rest, without a special power?] Sect. 217 of stat. 6 & 7 W. 4. c. lxxxii. enacts that, if the railway and works authorized by that statute "shall not have been made and completed, unless prevented by an inevitable accident," within seven years, all the powers &c. given by that act shall cease, except as to so much (if any) of the work as shall be certified to have been completed. The question may be different as between the Company and a shareholder requiring a proper application of funds, so far as

(a) 1 *Mylne & K.* 154.(b) 10 *A. & E.* 531.

they will go, and between them and one of the public applying for a mandamus. [Lord *Campbell* C. J. There is a great distinction.] Many provisions in railway acts (as clauses relative to bridges, or to crossing on a level) are imperative if the railway is made and reaches a certain point, but cannot become so otherwise.

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Stat. 8 & 9 *Vict. c. 18. s. 16.* enacts that, where the undertaking is to be effected by a capital subscribed by the promoters, the whole capital must be subscribed under a binding contract before any of the compulsory powers for taking land shall be put in force. If the Company are compellable to proceed with the works under the penalties of disobedience to a mandamus, it should follow that the subscribers might be called upon by mandamus to pay up the capital. If the words "it shall be lawful," or equivalent terms, are imperative in acts of this kind, the most entire want of funds, under whatever circumstances, would be no excuse. [Lord *Campbell* C. J. The foundation of the mandamus is a duty; and that may be absolute or qualified.]

Hugh Hill, in reply. The difficulty suggested, in the case of an absolute want of funds, was considered by this Court in *Regina v. London & North Western Railway Company (a)*. As to the meaning of words

(a) A full report of this case, and of *Regina v. York, Newcastle & Berwick Railway Company*, June 2d, 1851, involving the same question, will be found in the *Queen's Bench Reports* for Easter term, 1851. But it may be convenient to insert here the judgment of the Court in the former case, which was delivered, May 7th 1851, by

LORD CAMPBELL C. J. In this case we are of opinion that the defendants are entitled to our judgment. The objection that the powers of the Company for the compulsory purchase of lands had expired before the writ of mandamus issued or was applied for seems to us to be clearly decisive. We are not called upon, therefore, to decide the more doubtful

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which may be permissive or obligatory, if there be an ambiguity the construction must be in favour of the

questions, whether there lay upon the Company an obligation to make and complete the road, which might have been enforced by mandamus, or whether the return sufficiently shews a want of funds for the purpose, or how far this want of funds would be an answer. This writ of mandamus, which is tested the 22d day of April 1850, commands the Company immediately to purchase the lands necessary for making, constructing, executing and completing the *Birstal* Branch Railway, and extension thereof, and to make, construct and complete the same *Birstal* Branch Railway and extension thereof, in pursuance of the provisions, powers and authorities contained in the recited acts of Parliament. The special act, 9 & 10 Vict. c. cclxii., which received the Royal Assent 27th July 1846, enacts, by sect. 18, "that the powers of the Company for the compulsory purchase of lands for the purposes of this act shall not be exercised after the expiration of three years from the passing of this act;" and, by sect. 20, that the "works hereby authorized shall be completed within five years from the passing of this act, and on the expiration of such period the powers" "granted to the Company for executing the same shall cease to be exercised, except as to so much of the same respectively as shall then be completed."

The power effectually to obey the command in the writ having expired in July 1849, ought we in the Queen's name to have given the command in April 1850? On full consideration, we think not. A writ of mandamus supposes the required act to be possible and to be obligatory when the writ issues. Generally speaking, the writ suggests facts shewing the obligation and the possibility of fulfilling it; a return pursuing this suggestion and traversing it is good; *Rex v. Commissioners of Sewers in Essex* (2 Stra. 763), *Rex v. Round* (4 A. & E. 139), *Rex v. Williams* (8 B. & C. 681), *Rex v. Penrice* (2 Stra. 1235). The supposed obligation here is founded on public acts of parliament, which are recited in the writ and return, and of which we are bound to take judicial notice. If they shew that the Company have no longer power to do the act commanded, the writ is bad. What power have the defendants now to purchase the lands necessary for making a line of railway of several miles? A peremptory mandamus going as is prayed, no excuse can afterwards be made, and the defendants must implicitly and fully obey it under pain of imprisonment. Supposing that they were bound to pay any prices which might be demanded, however extortionate, can it reasonably be supposed that all the landowners along the line will be willing to sell at any price, and that none of them are under disability to sell? Mr. *Knowles* contended that the return should have shewn an application to all the landowners, and a refusal by them.

public, and against the Company, who have obtained the act for their own benefit; *Webb v. The Manchester and Leeds Railway Company* (a), *Priestley v. Foulds* (b), *The Clarence Railway Company v. The Great North of England &c. Railway Company* (c); and to the exclusion of other parties who might be desirous of the same advantages. In *Sir W. C. Anstruther v. East of Fife Railway Company* (d) there was no decision on the point now

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But such a return, and the issues arising upon it, would be highly inconvenient; and, even if all had promised to sell, without a binding contract having been entered into, they might afterwards change their minds, and the defendants might be subject to perpetual imprisonment for not doing what the law prohibits them to do. It was then said that they have violated the acts of Parliament by not duly completing the whole of the railway, and that they ought not to be allowed to make the objection which amounts to taking advantage of their own wrong. But, assuming that they were under the obligation contended for, and that they are liable to be punished by indictment for a breach of it, how can we say that the remedy now is to command them to do what they have no longer the power to do, however obediently they may be inclined? Reliance was very properly placed on the case of *Regina v. The Birmingham and Gloucester Railway Company* (2 Q. B. 47), which at first sight seems an authority in favour of the mandamus; but, when properly examined, it will be found on this point to be entitled to little weight. The great struggle there was, whether the turnpike road, when restored, must be as wide as it had formerly been. There the notice to do the act had been given as early as possible; and the act to be done was merely to restore the turnpike road to its former width, which apparently required no purchase of land either voluntary or compulsory. In the present case the prosecutors were guilty of laches by giving no notice to do the act till the power of doing it was expiring, and not applying for the mandamus till a considerable time after the power had expired. In the former case the Company might reasonably have been expected to be able to do the act without any power of compulsory purchase; but in the present case this is a mere impossibility.

We therefore think that both on principle and authority our judgment must be for the defendants.

Judgment for defendants.

(a) 4 *Mylne & Cr.* 116. 120.

(b) 2 *Man. & G.* 175. See p. 190.

(c) 4 Q. B. 46.

(d) 1 *Macqueen*, 98.

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before the Court. *Cohen v. Wilkinson* (a) is an authority for this mandamus. There an injunction was granted, at the instance of a shareholder, to prevent the Company from making the railway to a point short of that originally contemplated: but it was admitted that shareholders and the public had their respective rights; and persons not shareholders may, in such a case, insist upon the work being carried on to a given point, leaving it open to the Company (as was said by Lord Cottenham C. in *Cohen v. Wilkinson* (a)) to complete the whole.

Cur. adv. vult.

In this term (November 16th), the Court being divided in opinion, separate judgments were delivered, by ERLE J., and by Lord CAMPBELL C. J. and CROMPTON J., as follows.

ERLE J. Upon this record, the material facts appear to be these. The defendants had obtained an Act of Parliament making it lawful for them to construct a railway from *York* through *Market Weighton* to *Beverley*, and giving them the usual powers for that purpose; and they had completed and opened a part of the line as far as *Weighton*, and had not begun upon the remainder. As to three miles of this remainder nearest to *Beverley*, the powers under the Act had expired, and the mandamus related to the making of a part only of this remainder, running through a thinly peopled district, and ending in the village of *Burton*, without ulterior railway communication. One of the applicants was a landholder who had land upon the line, both between

(a) 12 *Beav.* 125. 138; 1 *Macn. & G.* 481.

York and Weigh-ton, and also between *Weigh-ton* and *Beverley*, and a part of his land had been used for the part of the line that was complete.

Upon these facts, the defendants contend that no legal obligation to complete the line of railway is shewn; and, in answer thereto, the prosecutors allege, first, that the obligation was created by the statute alone, and, secondly, by the statute together with the subsequent facts.

The first ground is of wide application, and involves important consequences to valuable property. It assumes that all private acts of Parliament granting to applicants powers of compulsory purchase of lands, and other powers for the purpose of executing a project represented to be beneficial to the public, impose the legal duty upon the grantees of doing all that they are so empowered to do until the project is executed, and in case of omission make the grantees liable to indictment, and to action at the suit of any party who is specially damaged, and also liable to be called on for specific performance of their project by mandamus.

If the duty is supposed to be created by the statute, the question must be decided by the words of the statute, construed according to ordinary rules, and must depend upon the intention of the Legislature, to be collected therefrom. And, according to my understanding of this statute, the legal duty of completing the projected railway was not imposed thereby.

The language in respect of making the railway is permissive, not imperative, the distinction between permissive and imperative language being maintained throughout the statutes on this subject. Imperative language is used when a clear duty is to be executed;

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and permissive language in common understanding would express that the matter is to be optional. Thus the company are permitted at their option to take lands, turn roads, alter streams, and exercise other powers, and these matters are made lawful for them; but they are commanded to make compensation for lands taken, to substitute new roads for those they turn, and to perform other conditions relating to the exercise of the powers: and these matters are required from them.

Also, where there is reason for departing from the usual course, and the duty of completing the railway is intended to be absolutely or conditionally imposed, imperative language has been substituted for permissive, and companies have been required to make their lines. The provisions prohibiting the commencement of operations till the capital has been subscribed for (a), and putting an end to the powers after the lapse of three or five years if the railway is not then completed, indicate that the Legislature, instead of creating an absolute duty, granted a privilege to be exercised at option upon a contingency within a limited time. The statute is passed on the assumption that the undertaking will be profitable, and that therefore the work will be willingly continued: and when the completion would be attended with loss the general public interest is against the completion, though the interest of some of the adjacent landowners may be promoted in sinking the capital of others for the improvement of their estates. There seems to me to be no ground for the notion that the powers granted to the company ought to be regarded in the light of a consideration for undertaking an onerous duty. Generally speaking, they are no boon unless they

(a) Stat. 8 & 9 Vict. c. 18. s. 16.

lead to a profitable undertaking. Thus the power of taking land on the terms of paying both its market value, and compensation for damage, and restoring it at a less price if no railway is made, or the power of turning roads and streams with a present substitution and a future restoration, give no advantage, and are not desirable unless as a means to a profitable end. Every step from preparing for applying to Parliament until the opening of the line is a loss of labour and capital consented to by the company for the privilege of attempting to make a profitable work in the end, which privilege is granted by Parliament because the profit (if any) must be attained through the promotion of the public convenience.

Also, equally groundless in my opinion is the notion that the consent of some of the landowners to their lands being bought for a price compensating for all value and all damage is a consideration for each landowner on the line to demand the outlay of the Company's funds for the benefit of his estate, against the interest of the shareholders, and possibly against the wish of many of his neighbours. The different landowners may have different rights; a landowner may oppose the Bill, and, after it has passed, insist upon the utmost for value and damage in respect of land taken; or he may oppose till his consent is bought at the best price he can get for it; and he may also insist on the utmost for value and damage; or he may consent to the Bill, and to take agricultural value for his land, and receive payment in shares. In the first and second instances, he would seem to me to have no ulterior right beyond the restoration of his land if no railway is made. In the last case, there may be a civil right against the other shareholders, to require that

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the shares should be paid up, and the funds applied in the best manner for the project; and a mandamus may be so framed as to be a beneficial remedy for the enforcement of this and other civil rights resembling rights from contract. But the prosecutors of the present writ have no such case: they rely, partly on a breach of public duty for which any one may indict, and partly on the private wrong of suffering special loss from not having the benefit of railway communication for their land, for which an action would lie, and partly on the assumption of a quasi contract between each landowner and the Company. But that I think neither of the two first points would support the writ; and the mere fact of being a landowner on the line is not sufficient to establish the third.

For these reasons, I come to the conclusion that the present writ cannot be sustained on the first ground above mentioned, *viz.*, that the statute alone created the duty: and indeed, upon the argument in this case, this ground was not at all relied on.

Then, was the duty in question created by the statute together with the subsequent facts; that is, by the statute, followed by the exercise of some of the compulsory powers granted thereby? In disposing of this question, I beg to confine myself to the facts of this case; and, although they are not in my judgment sufficient to support this writ, still many cases may occur where the exercise of some of the compulsory powers may create a duty to be enforced by mandamus. Here a part of the proposed line, as far as there was any prospect of profit, has been made; the residue has been abandoned, not from any corrupt motive of favour, or ill will, nor with any deception or bad faith, but because *Beverley* has other railway accommodation, and the district from

Wighton to Burton alone would not repay the necessary expenditure. Where the defendants have taken land, they have made and opened a railway; and where they have abandoned their project they have taken away no existing public right; they merely leave the district in its former state. To ascertain whether the duty arises upon these facts, recourse must again be had to the statute; for the facts taken by themselves are wholly inoperative to originate the supposed duty: the statute might attach any legal consequence to them; but unless they have a statutable force, they operate nothing. Now throughout the statute no provision is found to the effect contended for: there is no enactment requiring the completion of the whole if a part is begun, and no indication of an intention in the Legislature that this increased responsibility should arise from the exercising of any of the powers, or the making of part of the line. The suppositions, that the prosecutors consented to the bill before Parliament in the expectation of the whole line being made, or that the incomplete line is an inconvenience or desight to the neighbourhood, are no origin for a legal duty to complete the line. They are considerations which might guide Parliament in respect of imposing that duty; but, if there are no words in the act that can be justly construed to create it, these considerations do not authorize the Court to decide that such a duty was created.

The obligation arising from taking land to make a railway thereon appears to me fulfilled by making and opening an available railway as far as the land is taken: and the owner of land so taken does not in my opinion acquire a better right than other landowners in respect of his land on the line that has been abandoned.

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This brings me to the consideration of the main ground of the prosecutors, namely, Lord *Eldon*'s words in *Blakemore v. Glamorganshire Canal Company* (a); who, speaking of acts obtained by companies for private undertakings, says: "When I look upon these Acts of Parliament, I regard them all in the light of contracts made by the Legislature, on behalf of every person interested in anything to be done under them; and I have no hesitation in asserting that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than anything in the whole system of administration under our constitution. Such acts of parliament have now become extremely numerous; and, from their number and operation, they so much affect individuals, that I apprehend those who come for them to Parliament, do, in effect, undertake that they shall do and submit to whatever the Legislature empowers and compels them to do; and that they shall do nothing else:—that they shall do and shall forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public, as with reference to the interests of individuals."

Lord *Eldon* is supposed to have here laid down that companies can be compelled to do all that they are empowered to do under their act: but his words do not bear this meaning. He says, the companies shall do whatever the Legislature empowers *and* compels them to do: whereas he is supposed to say, they shall do whatever the Legislature either empowers *or* compels them to do. It cannot be supposed that the learned Judge meant to construe words of permission, empower-

(a) 1 *Mylne & Keen*, 162.

ing an act, to be words of command, requiring that act, if the Legislature did not so intend. The supposed principle was not involved in the judgment he was pronouncing relating to the surplus water of the canal; because the duty of leaving that surplus water, and the right of taking it, were created by appropriate words in the statute then in question: and the point for judgment was the meaning of "surplus water."

The words occur when the learned Judge is disposing of the question, whether Mr. *Blakemore's* right to this water under the statute was affected by the quality of his right before the statute. This of course is answered in the negative; for the statute is the origin of a new right created thereby, and such a new right is unaffected by old rights previous to the statute, inconsistent therewith. If the learned Judge regarded these statutes in the light of contracts, because rights created by such statutes are as original as rights created by contract, the observation is relevant, and is assented to as soon as understood. The same remark would apply to the concluding observation, if he meant that a company must do what the Legislature compels it to do, that is, must obey the law. Both propositions are too obvious to require expression. But, if the learned Judge is taken to mean that words in the class of statutes he referred to should receive a construction different from their ordinary meaning, upon the ground that such statutes would be a source of the greatest oppression if construed as usual, I think his meaning has been misunderstood; and such doctrine seems to me to be altogether erroneous: the attempt to introduce the incidents of a supposed contract between the company and other persons, and to regard the statute in the light of such

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contract, leads to confusion in reasoning; while the suggestion of the danger of the greatest oppression unless a new principle of construction should be adopted against companies creates an unjust prejudice in feeling.

This passage has been often cited: at times in the sense that the company must do what their statute requires them to do, in which it is harmless; at other times in the sense that they must do all that their act empowers them to do. In the latter sense, they were the foundation for the first decision in *Regina v. The Eastern Counties Railway Company (a)*, where the writ was issued commanding the completion of the whole line: because the statute empowered the Company to make the whole line, therefore it was construed to require it. This ground was again repeated when the peremptory mandamus was applied for and refused by reason of some informality in the first writ (*b*): but it was then accompanied by the observation that the case was in some respects new; and that its circumstances admitted of some doubt whether the power of the Court ought to be applied to them.

It is upon these authorities that the present application for the first instance of issuing a peremptory writ of mandamus to complete a railway is rested.

On the other side is the observation of Lord *Mansfield*, in *Rex v. The Proprietors of The Birmingham Canal Navigation (c)*, where a writ to the same effect as the present was applied for on stronger grounds than exist here, but refused by that eminent Judge, in these words: "The act imports only an authority to the proprietors, not a command. They may desert

(a) 10 *A. & E.* 531.

(b) 10 *A. & E.* 555, et seq.

(c) 2 *W. Bl.* 708.

or suspend the whole work, and *a fortiori* any part of it." In *Rex v. The Severn & Wye Railway Company* (a) the defendants destroyed a railway, it being a public highway which the applicants had used and required to use again: the writ therefore, commanding the reinstatement of it for the use of those who had a clear right to it, was in ordinary course; the duty and right were admitted to be clear; and the only objection was that the complainant had a remedy by indictment: but a mandamus to restore was considered to be better redress: still, in granting the mandamus so to restore, the Court expressly refused to command the maintaining of the way after restoring, although by the statute the Company were empowered to maintain, as well as to make the way.

Upon this review, there appears to be no precedent for issuing the writ now prayed for; and no instance has been cited of an indictment or action upon the supposed principle which is the foundation of the prosecutors' case. This absence of any precedent is equivalent to an authority against the existence of the principle; the occasions for bringing the principle into action, if it had existed, having been extremely numerous. The cases at law in which the principle has been under judicial consideration have been mentioned above; and the cases in equity bear rather upon the rights of shareholders inter se than upon the duties of the companies towards the public. And, upon the whole, the balance of authority appears to me to be against the prosecutors.

Considerations of convenience tend to the same conclusion. If the writ is refused, it will be for the Legislature in future to declare by clear words what

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duty is to be created, when it is to come into operation, and how to be enforced; and the law will be known. If the writ is granted, many questions, relating as well to the rights and duties of directors, as also to the remedy by mandamus for enforcing specific performance of very complicated duties, will remain to be settled hereafter by the discretion of the Court; and, in the mean time, the law as to these important matters will be left in uncertainty; and facilities for harassing by malicious litigation will be at the disposal of those who have ill will against a company.

In the present case there is a further defence, on the ground that the mandamus requires an incomplete work, which would probably remain useless. But, after expressing my opinion on the general grounds, it is needless to advert further to this point. And I think the judgment should be for the defendants.

Lord CAMPBELL C. J. The first question to be considered in this case is, whether the writ of mandamus be good upon the face of it.

The defendants, having been incorporated by act of Parliament in the reign of *William* the Fourth, under the title of "*The York & North Midland Railway Company*," obtained another act of Parliament in the year 1846, which, reciting that "it would be attended with local and public advantage if a railway were formed from the line of *The York & Scarborough Railway* at or near the city of *York* to *Beverley*" by *Market Weighton*, and that they were "willing to execute the same," gives them for this purpose all the powers conferred by their former special acts and by the Railways Clauses Consolidation Act, with powers to borrow additional

sums of money, and enacts, that "it shall be lawful for the said Company to make and maintain the said" railway "in the lines and upon the lands delineated" in the plans and described in the books deposited with the clerks of the peace, "and to enter upon, take, and use such of the said lands as should be necessary for such purpose."

It appears that the Company actually made this branch as far as from *York* to *Market Weighton*, about two thirds of the whole distance to *Beverley*; and so far it was open to the public. They then, in the year 1849, obtained another act to enable them to divert this line from its former direction between *Market Weighton* and *Cherry Burton*, a place about three miles from *Beverley*. This act, reciting that it would be of advantage if part of the said line between *Market Weighton* and *Beverley* were diverted, and if the part rendered unnecessary by such diversion were abandoned, and that the Company were willing to make such diversion, gives all the powers of the former railway acts for making this diversion, and enacts that it shall be lawful for the Company to make and maintain the said railway in the line, and upon the lands, described in certain new books of reference, and to enter upon, take and use such of the said lands as shall be necessary for such purpose.

The mandamus, after setting out the material parts of these acts of Parliament, alleges that, although a reasonable time for completing the railway mentioned in the last act had elapsed, the Company had not made it, and had abandoned all intention to make and complete it. Allegations are then introduced, that *David Burton*, one of the prosecutors, at the time of the passing of the act of 1846 was, and still is, owner of lands over which by that act

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the railway was to pass, and authorized to be abandoned by the act of 1849, and, at the passing of the latter act, he was and still is owner of other lands which the line described in the act of 1849 would pass over, as shewn in the books of reference; and that *John Leaing*, at the time of the passing of these acts, was, and still is, owner of lands which the Company were authorized to take; and that a portion of his lands had been required by the Company, and had been by him conveyed to the Company for the purposes aforesaid; and that the remaining portion of his lands was much lessened in value by reason of the non-completion of the said line of railway; and that the compulsory powers of the act of 1846 had been duly extended for two years: and that *Burton* and *Leaing* were desirous that the line should be completed; and that the completion of the same would be of great public benefit and advantage, by affording to the inhabitants of the said towns of *Beverley*, and *Cherry Burton*, and the surrounding districts, means of easy and speedy communication with *York* and the *North of England*, and *Selby* and the *West of England*, and the inhabitants of the districts intervening between *Market Weighton* and *Cherry Burton* means of easy and speedy communication with *Beverley*, and with *Hull*, *Driffield*, and *Bridlington*, *Scarborough*, *Whitby*, and *Malton*. The writ, after further alleging a request to the Company by *Burton* and *Leaing* to complete the line of diversion mentioned in the act of 1849, and a refusal so to do, proceeds to command the Company to complete the railroad from *Market Weighton* to *Cherry Burton*, or to shew cause to the contrary.

The portion of the line between *Market Weighton* and *Cherry Burton*, to which the mandamus applies, is not

to be considered a separate railway, or even a separate branch of railway, but is clearly to be treated as if in its present direction it had been included in the act of 1846, the powers of compulsory purchase for making it being extended to the 13th *July* 1852, although the powers of compulsory purchase for making the remainder of the line, from *Cherry Burton* to *Beverley*, expired on the 18th of *June* 1849. Under these circumstances, are the prosecutors *primâ facie* entitled to this mandamus?

To answer this question, it is unnecessary to decide whether a Company, incorporated by an act of Parliament which says "that it shall be lawful for them to make a certain railway," are bound to make it, if they have never availed themselves of the extraordinary powers conferred upon them, and they had come to a resolution entirely to abandon the undertaking before they had begun to execute it. Even if it were conceded that, down to the time when the Company in fact exercise the extraordinary powers conferred upon them over the property and rights of others, the power to do so may be only permissive and discretionary, a different state of affairs arises when they have actually begun to exercise these powers, when they have taken land by compulsion under the act, and when they have made and opened a part of the railway. They are not in the situation of purchasers of land with liberty to convert it to any purpose, or to allow it to lie waste. They are allowed to purchase it only for the purpose of a railway: and, when they do purchase it under the compulsory powers conferred upon them (which we have held that they do when they serve a notice that they require the land), I am clearly of opinion that they enter into a contract to construct a railway upon it. It was only

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with a view to the construction of a railway that the compulsory powers were conferred; and there must be an obligation on the Company to apply the land so obtained to this and to no other purpose. But this contract with an individual landowner cannot be performed by merely laying rails over the section of land taken from him. It was never intended that he should be left with a high mound or a deep cutting running through the middle of his estate, and neither leading from or to any other terminus. What then are to be the termini? Surely, those specified in the railway act. The Legislature contemplated the completion of this railway when it passed the act. The enjoyment of such a railway is part of the compensation given to the landowner for depriving him of his property against his will, and may in many cases be fairly taken into consideration in estimating the compensation he is to receive. A railway being partly made, the *public* have likewise an interest that it should be completed. The powers given to cross ancient highways, and to construct the railway, would often be prejudicial to the public if only partially exercised: and it cannot be left to the Company capriciously, or from interested motives, to abandon parts of the specified line, and thereby to deprive the inhabitants of particular towns or districts of the benefit which was intended for them.

The interest of shareholders is not considered in this particular mandamus: but I may here observe that, as to the shareholders, the Company may contract an obligation to complete a railway which they have begun; for not only have all the shareholders a common interest that the undertaking should be completed, but particular classes of them may have taken shares, and paid

calls, with a view to the railroad coming to their localities; and they would be very much aggrieved if only a part of it was constructed, from which they would receive no accommodation.

Is it not then the duty of the Railway Company to complete the line specified in their act of Parliament, they having represented to the Legislature that the making of the whole of it "would be attended with local and public advantage," and that they were willing to make the whole, and they having obtained from the Legislature the powers which they have partially used, on the faith of these representations. It is to be presumed that they have the means of performing this duty; for they have likewise represented to the Legislature that the funds which have been subscribed, and which they are enabled to raise, are sufficient for that purpose.

The next question is, if they are able and refuse, ought they not to be compelled to do their duty by a writ of mandamus? It is only necessary to observe that there is no other adequate remedy. Suppose that an action would lie against the Company at the suit of a landowner, whose land has been taken from him by the Company and not used for the purpose of a railway, or, because the railway, which ought to go several miles farther to a neighbouring town, is left unfinished at the boundary of his estate, or anywhere short of the town; he could only recover damages, without any specific relief. Again, if the Company were convicted upon an indictment for disobeying the act of Parliament in this respect, the Court could only impose a fine, without ordering the railway to be completed.

The question really is, whether there be a duty upon

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the Railway Company to do the act; for, if there be, mandamus is clearly the appropriate remedy. We are in the constant habit of granting writs of mandamus to Railway Companies to do what is necessary for granting compensation for land which they take, or which is injuriously affected by their works, and to do other acts according to the duty imposed upon them; and no distinction can be made between these and the act of constructing a part of the railway, if their duty so requires. Suppose there were an act of Parliament obtained, in the usual form, for making a railway from the town of *A.* to the town of *B.*, the distance being ten miles, the intervening land all belonging to *X.* and *Y.*, and the Company, having got possession of the requisite quantity of land under the compulsory clauses of their act, had actually completed the railway and opened it to the public, and then, resolving to abandon it, removed the rails, leaving the mounds and deep cuttings remaining; would not this Court, on the application of *X.* and *Y.*, grant a mandamus to the Company to reinstate it? For this *Rex v. The Severn and Wye Railway Company* (a) is expressly in point, and is an authority which has never been questioned. Suppose that the Company I have imagined had made the railway for two thirds of the line between *A.* and *B.*, and had then refused to go farther, can there be the smallest doubt that Lord *Tenterden*, Mr. Justice *Bayley* and Mr. Justice *Holroyd*, on the same principle, would at the suit of *X.* and *Y.* have granted a mandamus to complete it? Such a case would have been on all fours with the present, had this mandamus before the contemplated diversion been applied for to complete the

(a) 2 *B. & Ald.* 646.

railway from *Market Weighton* to *Beverley*; for part of the lands of the two applicants had been taken by the Company, and other part was liable to be taken. There would have been a duty on the Company to complete the line; and, Mr. *Burton* and Mr. *Leaving* being sufferers by the breach of that duty, they would have been entitled to the mandamus. Surely, they are equally entitled to it although it does not include the space between *Cherry Burton* and *Beverley*; as the space between *Market Weighton* and *Cherry Burton* is part of the line which the Company undertook to complete, and their powers of compulsory purchase respecting it were still in full force when the mandamus issued.

Although, as yet, there has not been any solemn determination that a mandamus will lie to complete a railway, there are many authorities to support the doctrine that there is a contract, duty or obligation on which the mandamus rests.

I begin with *Rex v. The Proprietors of The Birmingham Canal Navigation* (a), in which Commissioners, being empowered to make a canal from a place called *New Hull Ring* to *Birmingham*, instead of beginning at *New Hull Ring* began in another part of the line, and, according to the marginal note, "mandamus to execute one part of a power granted by act of Parliament, first" was "denied." Lord *Mansfield* said: "There must be a strong case made to warrant such a mandamus. The present is a very weak one." The reporter, who "is not always accurate (b)," imputes these further words to Lord *Mansfield*: "The act imports only an *authority* to the proprietors, not a *command*. They may desert or suspend the whole work,

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(a) 2 W. Bl. 708.

(b) The reference in the text is probably to the judgment of Lord *Mansfield* in *Hassell v. Simpson*, 1 Doug. 89 (note 39), 93.

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and *a fortiori* any part of it." But *Willes* and *Blackstone* thought the application premature; "that the Court ought not to grant a mandamus, to compel them to cut to *New Hall Ring* first. But if, from sinister views, the Commissioners refused hereafter, to make any cut to *New Hall Ring* at all; that, perhaps, might be ground for a mandamus, when the rest of the navigation was finished." Therefore Lord *Mansfield* intimates an opinion that a strong case would warrant such a mandamus; and the other Judges, properly thinking the application premature, intimate a pretty clear opinion that at last the Company might be compelled by mandamus to complete the undertaking.

I then come to the well known passage in Lord *Eldon's* celebrated judgment in *Blakemore v. The Glamorganshire Canal Navigation (a)*. We are told that his language is inapplicable, because he was there dealing with an application for an injunction; but the principle he lays down is equally applicable wherever rights and obligations are to be determined upon the construction of such acts of Parliament, whether the application be in a Court of Equity for an *injunction* to prevent that from being done which is forbidden, or in this Court for a *mandamus* for the performance of a duty which the law imposes. He says: "When I look upon these acts of Parliament, I regard them all in the light of contracts made by the Legislature, on behalf of every person interested in anything to be done under them; and I have no hesitation in asserting that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than anything in the whole system of administration under our con-

(a) 1 *Mylne & Keen*, 162, 163.

stitution." "The parties are obliged to submit to the contract which the Legislature has made for them. The result is, that the contract shall be carried into execution; and the King's subjects are compelled to submit to it, upon the notion that it will be for the public good; but they are not compelled to submit to anything except what the Legislature has said shall be done." This doctrine has been recognised by every Judge in *Westminster Hall*, in Courts of Common Law and Courts of Equity, for very nearly thirty years, as often as the subject has been discussed: and it is wholly unnecessary to go through the long list of cases which have been cited in argument to prove that it has been so recognised and acted upon. We have only to ask, then, whether the two applicants were interested in what was to be done under the acts of Parliament for making the line of railway from *York* to *Beverley*, and whether the Company must not be considered, when taking their land under these acts of Parliament, to have contracted with them to complete the line for the three miles and a half between *Market Weighton* and *Cherry Burton*? I cannot doubt that there is such a contract between the Company who acquire lands under such an act of Parliament and the owner of the lands, that the Company will apply the land to the purposes of the railway, and complete the line. If so, a mandamus should issue to enforce it.

Such is the view of the subject which was taken by Lord *Denman*, Mr. Justice *Littledale*, Mr. Justice *Patterson* and Mr. Justice *Williams*, the Judges of this Court, in 1839, when, in the case of *Regina v. The Eastern Counties Railway Company (a)*, a mandamus to complete

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(a) 10 A. & E. 531.

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a railway was first applied for : and, although this is not a conclusive authority, because, for want of an averment that the Company had abandoned the design to complete the railway, a peremptory mandamus was not awarded, it is entitled to much weight. When the return was discussed, all the arguments against the mandamus which could suggest themselves to the subtle mind of Sir *William Follett*, and which were repeated at the Bar in the present case, were brought forward ; and Lord *Denman*, after enumerating them, says : “ We think it right so far to advert to these remarks, that we may wholly disavow them as having at all conduced to the judgment which we are about to pronounce.” “ We shall keep our minds open for the discussion of all such doubts on every proper occasion : but we do not yield to them ; nor is it necessary to advert to them in coming to our present decision. We neither hold the Court incompetent to enforce execution of an act under the circumstances disclosed to us in the affidavits, nor think any of the reasons which have been enumerated are conclusive against making our mandamus peremptory.” He afterwards points out the fatal defect. “ The rule was made absolute, and the writ was directed to go, on the supposition that they had no intention to proceed bonâ fide with their works, and had on the contrary abandoned all intention to complete them. But the prosecutors of the writ have stated no such facts.” “ We can infer no fault ; it must be distinctly charged ; and the charge, as it stands, is quite insufficient, and falls decidedly below the case which we thought was made reasonably probable by the affidavits on both sides.” This is the ground on which judgment was given for the defendants : and, although it was expressly

said that these points were to be open to argument hereafter, there seems reason to believe that, if the abandonment of a part of the line had been sufficiently averred, a peremptory mandamus would then have been awarded.

I may likewise observe, that, in the case of *Sir W. C. Anstruther v. East of Fife Railway Company (a)*, upon appeal to the House of Lords from the Court of Session in *Scotland*, the present Lord Chancellor, Lord *St. Leonards*, intimates a pretty clear opinion that, if a railway Company have taken land under the compulsory powers conferred upon them, and have begun to make the railway, they are not at liberty to abandon it.

Assuming that, for these reasons and on these authorities, this mandamus has lawfully issued, and is good upon the face of it, I now proceed to examine the return which the defendants have made to it.

They mainly rely upon their statement that, of the line from *York* to *Beverley*, the part between *Cherry Burton* and *Beverley*, which is three miles long, has not been made or begun to be made, and that the compulsory powers of purchasing land for making it expired on the 13th of *July* 1851, before this writ of mandamus issued. There is no allegation of impossibility or want of power to purchase lands to complete the part of the line specified in the mandamus, which is between *Market Weighton* and *Cherry Burton*: and, if there was an obligation upon the Company by the Legislature to complete the whole from *Market Weighton* to *Beverley*, it would be strange if they could set up a want of power arising from their own neglect to do more than they are commanded to do by this mandamus as an excuse for not performing

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(a) 19 *Law Times*, 130; *S. C. 1 Macqueen*, 98.

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a duty which they do not deny they have the power of doing; namely, to complete the line between *Market Weighton* and *Cherry Burton*. They say that it would be unlawful for them to go so far without going farther; and *Cohen v. Wilkinson* (a) is confidently cited as an authority in their favour. But, when this case is examined, it appears to me that, in as far as it has any application to the present, it is in favour of the prosecutors. There, a company being formed and incorporated to construct a railway from *Epsom* to *Portsmouth*, the directors resolved that they would make the line from *Epsom* to *Leatherhead*, and no farther, having entered into an arrangement with another company, whereby the original design was to be abandoned. Certain shareholders, who wished the original design to be adhered to and completed, filed a bill for an injunction; and Lord *Langdale* very properly held that the directors had no power to change their original design, and to misapply the funds of the Company. This shews that the present defendants acted unlawfully in resolving that they would apply the funds of the Company to make the line as far as *Market Weighton* and no farther, and that the original design of completing it to *Beverley* should be abandoned. The dispute there was between shareholders and directors who were charged with a breach of trust; and what was there laid down has hardly any application to a case like this, in which it is complained that a Railway company has not performed a statutory duty imposed upon it, whereby an injury accrues to individuals not members of the Company, and also to the public. This mandamus, instead of requiring the Company, as has been sug-

(a) 12 *Beav.* 125, 138; 1 *Macn. & Gord.* 481.

gested, to abandon the original design mentioned in the act of Parliament, requires them to proceed in carrying it into effect. It can be no misapplication of the funds to make the line between *Market Weighton* and *Cherry Burton*, more than it would be to keep the railway in repair between *York* and *Market Weighton*. Suppose the Company were now to remove the rails from this portion of the line, *Rex v. The Severn & Wye Railway Company* (a) would be a clear authority for a mandamus to restore it: and the argument that this is only a part of an uncompleted line would be as strong against that mandamus as against a mandamus with respect to the portion of the line between *Market Weighton* and *Cherry Burton*.

The defendants further return that *Cherry Burton* is a small village three miles from *Beverley*; that a convenient station could not be made there for the inhabitants of *Beverley*; that the district between *Market Weighton* and *Cherry Burton* is thinly peopled; and that there are means of convenient communication from that to other places in *England*, irrespective of this railway to *Beverley*. But what weight can we attach to these assertions, contrary to what is declared in the preamble of the act of Parliament, that "it would be attended with local and public advantage" if this railway were formed? The Company must have brought forward evidence to convince the two Houses of Parliament that the preamble was true, and that they were then "willing to execute the same" railway. If the prosecutors and the public were entitled under the act of Parliament to still greater advantages than they will enjoy when this mandamus

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(a) 2 B. & Ald. 646.

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shall be obeyed, it seems strange that the Company should be permitted to allege their own wrong as a reason for withholding what is now claimed, and what may now be easily perfected.

The Company next allege that the portion of the line described in the mandamus would not be remunerative to the Company. This is very likely to be true, or it would have been completed and opened long ago. But no one can gravely contend that a Company, having obtained powers to make a long line of railway, may at their pleasure make the parts of it which may be profitable, and abandon the rest. Nor need I do more than repeat the futile language which follows: "that the making of the same railway would be a useless expenditure of labour and money, whilst it would be destructive of the lands through which it would go for any agricultural or other useful or beneficial purpose." It was hardly contended that an issue could be taken upon such an allegation; and it was hardly denied that, although the making of a particular portion of the railway may not be profitable to the Company, it may be of great benefit to particular individuals, and to the public, that the whole should be completed. I have only further to notice the allegation of want of funds; "that all and every the sum and sums of money applicable to the purposes of the said" act, "which can in reasonable probability come to the possession of, or be disposable by, us the said Company will fall short by a very large sum of money, and not less than 100,000*l.*, of the aggregate sum necessary for the making of the railway authorized by the said" act, "and which we the said Company are by the annexed writ commanded to make." I am not exactly sure how far this part of the return is meant to

be relied upon; for the Solicitor General, in arguing the question, whether such an act of Parliament only gives a permission or imposes an obligation, insisted that, if there were an obligation, want of funds would be no defence.

Upon an application for a mandamus to complete a railway, were it clearly made out to the satisfaction of the Court that the Company, although carrying out the design with good faith and with prudence, was, from unforeseen casualties, left entirely without funds, I make no doubt that, in the exercise of our discretion, we should refuse the application, and leave the parties to such relief as they might obtain by interposition of the Legislature: and I am not prepared to say that, a mandamus having issued, there might not be a return of an absolute exhaustion of funds, and an impossibility of raising any, so framed as to amount to an answer. But I am quite clear that this attempt at alleging a want of funds is wholly abortive. The defendants do not say that they have not funds in hand which would be sufficient to enable them to do all that they are commanded to do, which is to complete the line from *Market Weighton* to *Cherry Burton*; and they merely allege that, in reasonable probability, they may not have funds for all the purposes of the act of Parliament. Upon such a reasonable probability the prosecutors could not have taken any issue capable of being tried. I think they did well in demurring to the whole return; for, in my opinion, it affords no answer to the mandamus, either by any separate allegation, or by its multifarious allegations taken in conjunction.

I most heartily rejoice that these questions are upon the record, and that they may be carried to the Court

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pose:" And that the said railway should commence in the parish of *Huddersfield* in the West Riding, there to form a junction with the proposed railway from *Huddersfield* to *Manchester* (being the undertaking of the *Huddersfield & Manchester* Railway and Canal Company), and thence should pass from, in, through or into the several parishes, &c. and other places therein specified, and terminate by a junction with the *Sheffield, Ashton under Lyne, & Manchester* railway at or near *Penistone* in the township &c., in the said West Riding: And that the said branch should commence &c.; describing the course of such branch from and out of the main line at or near *Brockholes* in the West Riding to a termination at or near *Holmfirth*: powers for compulsory purchase of land not to be exercised after two years from the passing of the act (a): enactment (b), that the railway should be completed within five years from the passing of the act, and that, on the expiration of such period, the powers of that or the recited acts, granted to the Company for executing the railway or otherwise in relation thereto, should cease to be exercised, except as to so much of the railway as should then be completed: And that by the same act powers were given to the Company to demand tolls for the use of the railway, as therein mentioned.

The writ further recited that, by stat. 9 & 10 *Vict.* (c. cclxxvii., local and personal, public), "To incorporate *The Huddersfield & Sheffield Junction Railway Company* with *The Manchester & Leeds Railway Company* (c)," after reciting the first above mentioned act, and that the *Huddersfield & Sheffield Junction Railway Company* had commenced the construction of the said *Huddersfield &*

(a) Sect. 19.

(b) Sect. 20.

(c) Royal assent, July 27th, 1846.

Sheffield junction railway under the powers of the said act, and had introduced into Parliament a bill or bills for making certain extensions, &c. of or to their then present lines of railway, and that the *Manchester & Leeds* Railway Company had constructed the *Manchester & Leeds* railway authorized by the *Manchester & Leeds* Railway Act, 1836 (6 & 7 W. 4. c. cxi., local and personal, public); and reciting that it was considered that the *Huddersfield & Sheffield* Junction railway might be worked with greater economy and advantage and convenience if managed in conjunction with the undertakings of the *Manchester & Leeds* Railway Company; and that the said Companies were respectively willing that arrangements should be made for vesting upon certain conditions the undertakings of the *Huddersfield & Sheffield* Junction Railway Company, with the works &c. thereof and all the property &c. of the same Company, in the *Manchester & Leeds* Railway Company, and that the *Huddersfield & Sheffield* Junction Railway Company should be incorporated with the *Manchester & Leeds* Railway Company upon the terms and conditions thereafter expressed: it was enacted that the several undertakings of The *Huddersfield & Sheffield* Junction Railway Company, commenced or not then commenced, and all their lands, moneys, and other their real and personal estate &c., and all their rights &c., should, subject to the existing debts, liabilities &c. of the said Company, be, and the same were thereby, vested in the *Manchester & Leeds* Railway Company, and might be lawfully executed, completed, held, used and exercised by and in the name of the last mentioned Company in the same manner and to the same extent as the *Huddersfield & Sheffield* Junction Railway Company

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could have executed, completed, held, used, exercised and enjoyed the same if that act had not been passed, save only so far as the execution, completion, use, &c. of such undertaking, rights, &c., might be inconsistent with this act: And the writ recited that, by the same act, it was further enacted that all the powers, authorities, &c., matters and things contained in any act or acts relating to the *Huddersfield &c. Junction Railway Company* should, with reference to such works &c. as had been or might have been done by that Company in relation to their said undertaking, and save only as far as they were inconsistent with this act, &c., be executed, done, performed and observed by, and be applied and applicable to, the *Manchester & Leeds Railway Company*, their directors, officers, &c., in every respect, and as fully and effectually to all intents and purposes, as if the name of the *Manchester & Leeds Railway Company* had in every case been inserted in the acts relating to the *Huddersfield & Sheffield Junction Railway Company* instead of the name of that Company.

The writ then further recited that by an act, (10 & 11 *Vict. c. ciii.*, local and personal, public), "To enable *The Manchester and Leeds Railway Company* to make an extension of the *Holmfirth* branch of the *Huddersfield and Sheffield Junction Railway*" (a), after reciting stat. 9 & 10 *Vict. c. cclxxvii.*, and reciting also that, by the *West Riding Union Railways Act, 1846* (b), *The West Riding Union Railways Company* were incorporated, with powers to make a series of railways in the said West Riding, and, under the provisions of the same act, the last mentioned Company had become amalgamated with, and their

(a) Royal assent, July 2d, 1847.

(b) Stat. 9 & 10 *Vict. c. cccxc.*, local and personal, public.

undertakings and powers vested in, the *Manchester & Leeds* Railway Company; and also reciting (a) that "it is expedient that the *Manchester & Leeds* Railway Company should be empowered to make and maintain an extension" of the said *Holmfirth* Branch thereafter described, and that "the *Manchester & Leeds* Railway Company are willing at their own expense to undertake such works;" and also reciting that it was expedient that some of the powers and provisions contained in the acts therein recited should be altered &c.: It was enacted that all the powers, provisions, matters and things contained in any of the therein recited acts, with regard to the use of the railways by the said acts authorized to be made, and to the raising of money by shares, mortgages or otherwise, and to the shares created under the powers thereof, and all other powers, provisions, &c., contained in any of the recited acts, except such as were repealed, altered, &c., by the Lands or the Railways Clauses Consolidation Act, or any other act, or had expired by effluxion of time, should, as far as applicable, extend to that act and to the use and protection of the railways &c. thereby authorized to be made, and to the money to be raised by shares and mortgages or otherwise for the same, and to the shares created under that act; and generally should operate and be in force in reference thereto as fully and effectually as if repeated and re-enacted in that act: And (b) that the Lands and Railways Clauses Consolidation Acts, except as modified by, or inconsistent with, this act, should be incorporated with it: and that, in citing this act, it should be sufficient to use the expression "*The Manchester & Leeds Railway Act* (No. 2.) 1847:" And it was further enacted (c) (after

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(a) Sect. 1.

(b) Sects. 2, 3.

(c) Sects. 4, 5.

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reciting that the estimated expense of making the works authorized by this act was 56,000*l.*) that it should be lawful for the Company to raise by creation of shares an additional capital of that amount, such capital (*a*) to be considered as forming part of the general original capital authorized to be raised by them under the recited acts: further provisions for extending to the capital and moneys so raised by this act the provisions of *The Manchester & Leeds Railway Act, 1841*, as to the capital and moneys thereby authorized to be raised by mortgage: further enactment (*b*), that, after the whole capital authorized by the Company's acts to be raised by shares should have been subscribed, and one half paid up, it should be lawful for them to borrow on mortgage an additional sum not exceeding 18,600*l.*: And by the same act, 10 & 11 *Vict. c. ciii.*, after reciting deposit of plans and sections of the proposed Extension railway, with books of reference containing names of land-owners &c., it was enacted (*c*) that, subject to the provisions of that act and of the Lands and Railways Clauses Consolidation Acts, it should "be lawful for the Company to make and maintain the said Extension railway in the line and upon the lands delineated on the said plans and described in the said books of reference, and according to the levels defined on the said sections, and to enter upon, take, and use such of the said lands" as should be necessary for such purposes: and (*d*) that the said Extension railway should commence from and out of and by a junction with the intended *Holmfirth* branch of the said *Huddersfield & Sheffield Junction Railway* in a field in the occupation &c., in the township of *Wooldale*, &c., and terminate at

(*a*) Sect. 6.(*b*) Sect. 10.(*c*) Sect. 13.(*d*) Sect. 14.

a point &c., in a field occupied &c., in the township of *Cartworth*, &c.: And (a) that, after the expiration of five years from the passing of that act, all the powers thereby granted to the Company for making and executing the said Extension Railway and works, or otherwise in relation thereto, should cease to be exercised, except as to so much of the same as should then be completed.

The writ then recited stat. 10 & 11 *Vict. c. clxvi.*, local and personal, public(b), "To enable the *Manchester & Leeds Railway Company* to alter the lines and levels of the *Brighouse Branch* of the *West Riding Union Railways*, and to make a new line into *Leeds*," whereby it was enacted that *The Manchester & Leeds Railway Company* should in future be incorporated and have continuance by the name of *The Lancashire & Yorkshire Railway Company*, and should, by that name, have, hold, &c. all lands, &c., money, goods, &c., powers, rights, &c., which had before been, or should be, vested in *The Manchester & Leeds Railway Company*, together with certain railways belonging to that Company, which (including the *Huddersfield & Sheffield Junction Railway*) were specially enumerated: And that the Lands and Railways Clauses Consolidation Acts, except as modified &c., should be incorporated with this act.

The writ further recited that *The Lancashire & Yorkshire Railway Company* had applied to the Commissioners of Railways for an extension of time under stat. 11 & 12 *Vict. c. 3.*, and that the Commissioners, by warrant dated 23d *June*, 1848, had ordered and declared that the time limited by the *Huddersfield & Sheffield Junction Railway Act*, 8 & 9 *Vict. c. xxxix.*, for the completion of the railway and branch thereby authorized to be made,

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(a) Sect. 15.

(b) Royal assent, *July 9th*, 1847.

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should be extended for the further period of two years from the expiration of the said period so limited by such act as aforesaid, and that the time limited by the *Manchester & Leeds Railway Act*, 10 & 11 *Vict. c. ciii.*, for the completion of the Extension Railway should be extended for the further period of two years from the expiration of the period limited by such act: and also that the time limited by such act for the compulsory purchase of lands for constructing the said Extension Railway should be extended for the further period of two years from the expiration of the said last mentioned period so limited.

The writ then proceeded as follows.

And whereas We have been given to understand &c. that you, the said Company, have made the *Huddersfield & Sheffield Junction* railway authorized to be made by (stat. 8 & 9 *Vict. c. xxxix.*), and also the said Branch railway to the town of *Holmfirth*, but that you have not done or taken any acts or steps, or act or step, either as to the purchase of lands or otherwise, for making or completing, or commencing to make or complete, the said Extension railway authorized to be made by (stat. 10 & 11 *Vict. c. ciii.*): And whereas We have been given to understand &c. that the making and completing of the said Extension railway would be of great public advantage, and especially to the inhabitants of the district through which the said Extension railway if made would pass, and which district is a large, populous, manufacturing district; and that the said Extension railway, if made pursuant to the last mentioned act, would pass through parts of the several townships of *Wooldale* and *Cartworth* in the parish of *Kirkburton* in the West Riding of the said county of *York*; and that the whole of the lands necessary for making the said Extension branch railway

pursuant to the last mentioned act, and the works to be connected therewith, are situate in those townships; and that the length of the said proposed Extension branch railway is one mile and seven furlongs or thereabouts, and no more: And whereas We have been given to understand &c. that *George Hinchliff* at the time of the passing of the last mentioned act was, and still is, owner of lands situate in the township of *Cartworth*, through which the said Extension railway is by the said last mentioned act authorized to be made and passed, and that the said lands are shewn on the plans in that behalf deposited with the clerk of the peace of the West Riding; and that the name of the said *G. H.* is contained in the books of reference to the said plans so deposited as aforesaid; and that the said *G. H.* is desirous that the said Extension railway should be made and completed pursuant to the said statutes in that behalf: And whereas We have been given to understand &c. that a reasonable time for you, the said *Lancashire & Yorkshire Railway Company*, to have made and completed the said Extension railway has long since elapsed, and that you have abandoned all intention to make and complete the said Extension railway or any part thereof, and that the said *G. H.* hath required you, in obedience to the statutes in that behalf, to make and complete the said Extension railway, but that you, not regarding your duty in that behalf nor the said statutes, have absolutely refused and neglected, and still do refuse and neglect, to make or complete the said Extension railway, or to do or take any acts or steps, or any act or step, for that purpose, either by the purchase of lands or otherwise, to the great damage &c. of the said *G. H.*: Whereupon he has besought Us &c. The writ then commanded the Company immediately after receipt thereof to do and take

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all necessary acts and steps, both as to the purchase of lands and otherwise, for making and completing, and to make and complete, the said Extension railway, or shew cause &c.

Return. We, &c., certify and return &c. "That, although true it is that we the said Company have made the *Huddersfield & Sheffield Junction Railway* authorized to be made by the *Huddersfield & Sheffield Junction Railway Act, 1845*" (8 & 9 *Vict. c. xxxix.*), "and also the said Branch railway to the town of *Holmfirth* by that act also authorized to be made, yet true it is also that we have not done nor taken any acts or steps, or act or step, either as to the purchase of lands or otherwise, for making or completing, or commencing to make or complete, the said Extension railway authorized to be made by the *Manchester & Leeds Railway Act (No. 2), 1847*" (10 & 11 *Vict. c. ciii.*), "as is mentioned and stated in the said writ: Wherefore we the said *Lancashire & Yorkshire Railway Company* humbly submit that we were not at the coming of the said writ bound or liable by law, nor ought we to be required, to do and take all necessary acts and steps, both as to the purchase of lands and otherwise, for making and completing, and to make and complete, the said Extension Railway in the *Manchester & Leeds Railway Act (No. 2), 1847*, aforesaid, described, and thereby authorized to be made, as we are by the said annexed writ required to do.

Demurrer. Joinder.

The demurrer was argued in *Trinity* term (*June 9th*) 1852 (*a*), by Sir *F. Thesiger*, Attorney General, for

(a) Before Lord Campbell C. J., Coleridge, Erle and Crompton J.

the Crown, and Sir *F. Kelly*, Solicitor General, for the defendants. The discussion in the preceding case, and the judgment of the Court in this, make a particular report of the argument unnecessary.

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Sir *F. Theiger* mentioned, in addition to the cases before cited as to the obligatory effect of permissive words where the public interest is concerned, *Rex v. The Steward, &c. of Havering Atte Bower* (a). And he pointed out that for the abandonment of railways, where the Legislature meant to sanction it, a specific course had been provided by stat. 13 & 14 *Vict. c. 83*.

Sir *F. Kelly*, contra, observed that there were no words in the Extension Act commanding the Company to make the new line; and that, if the permissive words of the local acts now in question, and of similar statutes, were obligatory, companies might be compellable, by mandamus, to take the lands of every land owner named in their books of reference. [Lord *Campbell* C. J. There may be an obligation to do the work, though not to take all the land which they may take.] Sir *F. Kelly* also insisted upon the distinction to be drawn between cases in which shareholders litigated for the completion of works which concerned them in that capacity, and cases where a claim was advanced on behalf of the public. He further urged that, by stat. 8 & 9 *Vict. c. 18. s. 16.*, as well as by the special acts, the subscribing of the whole capital was a condition precedent to the exercising of the compulsory powers, and this was not shewn to have been fulfilled. [Lord *Campbell* C. J. There may be

(a) 5 B. & Ald. 691.

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a difference as to that point between an already established company taking powers to make an extension, and a new company formed only for the making of a particular railway.] Sir *F. Kelly* referred in particular to stat. 10 & 11 *Vict. c. ciii. sects. 4, 5, 6 (a)*, empowering the Company to raise an additional capital of 56,000*l.* by creation of shares, which additional sum was made part of the general and original capital authorized

(a) Stat. 10 & 11 *Vict. c. ciii. enacts as follows.*

Sect. 4. "And whereas the estimated expense of making the works authorized by this act is 56,000*l.*; be it enacted, that it shall be lawful for the Company to raise by the creation of shares an additional capital sum of 56,000*l.*, over and above the moneys which they are authorized to raise by virtue of the said recited acts or any of them, or any other act or acts of parliament, or which they may be authorized to raise by any acts of the present session of parliament.

Sect. 5. "And be it enacted, that for the purpose of raising the said additional capital of 56,000*l.* it shall be lawful for the Company to issue such and so many distinct shares, of such amount, and subject to the provisions of this and the said recited acts, and of any act of the present session, to be appropriated and disposed of in such manner, to such person or persons, and for such prices," &c., as by the order of any general or special general meeting of the said Company shall be determined.

Sect. 6. "And be it enacted, that the said additional capital of 56,000*l.* shall be considered as forming part of the general and original capital authorized to be raised by the Company under the said recited acts, and that all the provisions contained in or referred to by the said '*Manchester & Leeds Railway Act, 1841*,' with regard to the capital and moneys thereby authorized to be raised by shares or mortgage, and to the proprietors thereof, shall in all respects (except as herein otherwise provided, and subject to the order of any such general or special general meeting,) be especially applicable to the capital and moneys hereby authorized to be raised by shares or mortgage, and to the proprietors thereof."

(The *Manchester & Leeds Railway Act, 4 & 5 Vict. c. xxv.*, local and personal, public, "For enabling the *Manchester & Leeds Railway Company* to raise a further sum of money," above referred to, contained provisions empowering that Company to raise an additional capital, to be considered as part of the Company's general capital, by contribution among themselves, or by creation of new shares; and to borrow money on mortgage, after one half of the money authorized by the Company's acts to be raised by subscription should have been paid up.)

to be raised by the Company under the prior acts; and observed that this amount did not appear to have been raised, nor shares issued for the purpose. [Coleridge J. Supposing that that might make the writ bad, it would be no answer to the general question. Erle J. mentioned *Doe dem. Payne v. The Bristol & Exeter Railway Company* (a) (first point). Coleridge J. You do not shew that you have done anything towards putting the act in execution. Lord Campbell C. J. Or that you have found any difficulty in doing so. You do not allege that you have issued shares.] If the compulsory powers given by the act had expired, *Regina v. London & North Western Railway Company* (b), shews that that would be an answer. It is the same if they have never accrued. [Coleridge J. It comes to the question, whether any duty attaches by the passing of the act. As you argue, the Company, after obtaining the act, might at any time meet and resolve to do nothing. Lord Campbell C. J. Might not they have returned, here, that they had done what they could to issue shares, but found no purchasers?] As to stat. 13 & 14 Vict. c. 83., Sir F. Kelly contended that this was only a measure to give facilities for winding affairs up as among the shareholders themselves.

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Joseph Addison, who replied in the absence of Sir F. Thesiger, said that the making of the Extension line was not shewn to depend upon the raising of new capital, since it did not appear that the work might not be effected with the capital formerly raised. And he urged that the undertaking of the Company was a contract, which they were bound to fulfil. [Lord

(a) 6 M. & W. 320.

(b) See p. 199, note (a). ante.

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Campbell C. J. How do you make it a contract? By the Royal assent? It is in fieri till that is given; but the Royal assent operates like putting the seal to a deed. [Lord *Campbell C. J.* What consideration has the landowner given at that moment?] He has become subject to the liability of having his land taken. [Lord *Campbell C. J.* I believe a more important question as to property was never argued in this Court. We will take the long vacation to consider of it.]

Cur. adv. vult.

In this term, *November* 16th, judgment was delivered as follows.

Lord CAMPBELL C. J. After long and anxious deliberation, I have come to the conclusion that we are bound in this case to pronounce judgment for the prosecutors.

Where the directors of a Railway company have actually availed themselves of the extraordinary powers conferred upon them at their own solicitation and on their own representations, by getting possession of lands without the consent of the owners, and beginning the formation of a railway, which necessarily interferes with public as well as private rights, I have never been able to bring myself to doubt that there is a duty incumbent upon them to complete the undertaking, and that we are empowered to compel the performance of this duty by mandamus.

Whether, where the company have done nothing as between themselves and third parties or the public under their parliamentary powers, they may not wholly abandon the undertaking, is a very different question. I

was at first inclined to think that, till they have actually interfered with private or public rights after the passing of their act of Parliament, they are not to be considered as having entered into any contract, or incurred any obligation to execute the undertaking (a). Neither individuals nor the public necessarily suffer any severe injury by the scheme having been formed and repudiated; and neither the consideration nor the promise, which constitute the contract or obligation, can be said to be so apparent if the shareholders agree to dissolve the company as soon as the act of Parliament has passed. But my present opinion is that, at the moment when the act receives the Royal assent, the contract and obligation attach, and that by the Legislature alone can the contract and obligation be subsequently discharged. There is great difficulty in drawing any other line. The notion that upon the passing of the act there is a locus pœnitentiæ still allowed to the company is rather a gratuitous supposition; and I know not on what principle we are to interpolate the condition "if the company avail themselves" of the extraordinary powers which they have obtained upon a declaration that they were ready and willing, at their own expense, to execute a work declared by the Legislature to be greatly for the public benefit.

Regarding the transaction as matter of contract, we may well conclude that between the company and the owners of the land to be taken for the railway, as well as with the public, the contract is absolute when the act passes. There is ample consideration in the prejudice

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(a) His Lordship observed during the argument; "This is the first instance of an application to compel the making of a railway by mandamus, where nothing has been done."

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which the landowners sustain in being subject to a liability for a certain number of years to have their land forcibly taken from them, and in the benefit thereby accruing to the company. The reciprocal consideration flowing from the company is the expenditure which they are to incur, and the benefit they are to confer, by making and completing the railway. The mutual consents are given through the medium of the Legislature.

It was argued at the Bar that these acts of Parliament only give a permission to the company, because the powers are limited to a certain number of years: but this limitation seems manifestly to be introduced for the protection of the landowners, without giving the companies the power at their pleasure to abandon their undertaking.

For the landowners there is no *locus pœnitentiæ*. From the instant the act receives the Royal assent the company have the compulsory power of purchasing all the lands required by them throughout the whole extent of the railway, as specified in the books of reference, and by serving a notice they may become the actual purchasers at any moment till the long period to which the compulsory power of purchase is limited expires. Till then the landowners are deprived of their full right of ownership; and, if they are not to be compensated by the construction of the railway, they would in many cases sustain a serious loss. During all the time while the compulsory power of purchase subsists, they are prevented from alienating land or houses described in the book of reference, and from applying them to any purposes inconsistent with the claim which may be made to them by the Railway company. During the whole of this time, is one party to the contract to be bound and the other to be free?

Then, may not the public be considered a party to the contract? and will not the public be aggrieved if the contract may be repudiated by the company at any time before it is acted upon? The fact is agreed, that it would be for the public benefit that a new line of communication should be opened between certain termini; and the privilege of making it is conceded to a company, with extraordinary powers over highways and other public rights. Competitors who were willing to construct a railway between the same termini are defeated. For a period of at least five years no similar scheme can be brought forward. May it not reasonably be concluded, then, that the company are bound to perform their part of the contract as well in respect to the public as to the landowners? A permission which works no prejudice to the party who grants it may well leave the exercise of it optional with the grantee; but if it is granted at the request of the grantee, on a representation that he is about to exercise it for the benefit of the grantor, who cannot withdraw it, is not the fair inference that the obligation is reciprocal?

Rash and reckless speculators in railroad shares may thus be considerable losers, if when the shares suddenly fall to a discount they may not at their pleasure break up the concern. But, if a speculation of this sort is conducted on fair commercial principles, no real hardship can arise from considering that the contract binds the company as well as the landowners and the public. The company always declare their readiness and willingness to execute the work for the public benefit, and engage to find funds for the purpose. If the calculations have been honestly and prudently made, there is hardly a possibility of any discovery, before the work

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is begun, that it may not be advantageously carried on. If, in the progress of the work, unforeseen difficulties arise—if a tunnel costs much more than might reasonably have been expected, or bridges are swept away by an inundation—a new arrangement may be made under the sanction of Parliament. Applications have repeatedly been made with success to Parliament by Railway companies for leave to abandon the whole of their undertaking, or a particular branch of it. I cannot, therefore, allow that the apprehended ruin of shareholders should induce us to abstain from giving such acts of Parliament the construction which ought fairly to be put upon them. We are to find out what is the just inference from the nature of the transaction, and from the language employed. In some of these Railway acts we find the expression, “the company is required to make and maintain the railway;” in others, “it shall be lawful for the company to make and maintain.” I do not believe that a different meaning is really intended by these different expressions. The rule for construing the language of Parliament upon this subject is to be found in *Com. Dig. Parliament* (R 22.): “Words of permission shall be obligatory. If a statute says, that a thing for the public benefit may be done, it shall be construed that it must be done.” According to this rule, as the railway is expressly declared to be for the public benefit, these two forms of expression in acts of Parliament for the same object are synonymous.

Reliance was placed by the defendants' counsel on *Sir W. C. Anstruther v. East of Fife Railway Company* (a); but when that case is examined it will be

(a) 1 *Macqueen*, 98.

found to be no authority for them. There the special act received the Royal assent on 16th *July* 1846. The Company, having received deposits and calls, but before commencing any works, or giving any notices to land-owners, on 28th *March* 1849, came to a resolution to abandon their undertaking, and to apply to Parliament for an act to authorize them to do so. On 30th *May* following, the appellant made an application to the Court of Session in due form, "that the Company might be interdicted 'from taking any steps or proceedings, having for their object the dissolution of the said Company, and from returning or paying back to the shareholders the money advanced and paid by them in the shape of deposits or calls, and from violating the contract or agreement entered into between'" him "'and the said Company, and from acting in any other way prejudicial to'" his "'interests'" "'under the said contract or agreement, or contrary to the provisions of the statute incorporating the said Company.'" The appeal was against interlocutors refusing this interdict. The appellant's counsel admitted that the interdict would have prevented the Company from coming to Parliament for an act authorizing them to abandon the undertaking, but relied upon the very questionable dictum laid down by Lord *Cottenham*, in a case (a) where the Company had begun to make the railway, that the Court of Chancery may grant an injunction to stop proceedings in Parliament contrary to a contract supposed to have been entered into. It further appeared that the appellant had brought an action of declarator against the Company, for the purpose

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(a) *Heathcote v. The North Staffordshire Railway Company*, 2 Macn. & Gord. 100. 109.

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of having it found that the Company had no right to abandon the undertaking, and that in this action judgment had been given against him. Lord *St. Leonards*, therefore, in advising the House to dismiss the appeal, observed: "What is prayed, is a general injunction on the assumption that the right will be established at the very period when that right has been denied, and the injunction in effect dissolved by a judgment against the appellant in an action of declarator." "The appellant prays that the Company may be prevented from asking Parliament for an act to put an end to this proprietary. It is perfectly clear that the terms in which the injunction is sought would go to interdict such an application." "If such a person desires to oppose a projected measure in Parliament, he is at perfect liberty to do so; and he will be duly heard by the Legislature on the ground of his interest. But to grant an injunction in the circumstances of the present case is impossible." His Lordship afterwards goes on to observe that, to support the appeal, the propriety of the interdict in all its parts, as prayed, must be proved; and that there was no pretence for saying that the appellant had any right to restrain the Company from paying back deposits to the shareholders. The affirmance of the judgment refusing the interdict is no authority against this mandamus.

The question which is now before us is more nearly touched by the action of declarator in the Court of Session between the same parties (a). There, a learned Judge, Lord *Wood*, decided that the action was not maintainable; but he proceeded solely on the ground

(a) 1 *Macqueen*, 100, note (c) to *Sir W. C. Anstruther v. East of Fife Railway Company*.

that it had been commenced too late, and that an act had been passed by the Legislature authorizing the Company to abandon the undertaking. He says: "The compulsory powers authorising the Company to take lands expired in *July* 1849." "In 1850" they "applied to Parliament for leave to dissolve themselves; and having proved to the satisfaction of the Legislature that the construction of the railway 'had never been commenced,' and that it was expedient to abandon the undertaking," a bill passed enacting that the Company should cease to exist, except for payment of its debts, and that the Company were absolutely released and discharged from all obligation and liability to make the railway. "The action of declarator was instituted *before* the passing of the dissolving statute, but not till *after* the compulsory powers of taking land under the original act had expired; so that" the pursuer was clearly "too late in bringing his action." His Lordship, however, goes on to intimate a pretty strong opinion that, "had the proper demand been made while the compulsory powers" subsisted, "and within a reasonable time" before their cessation, an action for that purpose "*timeously* raised would have been maintainable by the pursuer," and he "might have been entitled to" the decree, now prayed, against the defenders (a).

Looking to stat. 11 & 12 *Vict. c. ciii.*, for making this extension by an existing company, which had previously made the line of railway to be extended, I doubt whether the Company, in respect of the extension, be exactly in the situation of a new company which had been created to construct a new railway, and which had never availed itself of any of the powers of the act.

(a) See authorities collected 1 *Macqueen*, 102, note.

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But, supposing the defendants to be in this situation, I think that the return to the mandamus would be bad, as only shewing that they had broken the contract, and disregarded the obligation to construct that railway which they are commanded to complete.

I have now to make a few observations on the form of the mandatory part of the writ, which is said to command what is unlawful, by requiring the Company "to do and take all necessary acts and steps, both as to the purchase of lands and otherwise, for making and completing, and to make and complete, the said Extension railway," pursuant to the statutes in that behalf. Under the 4th and following sections of the act, 10 & 11 *Vict. c. ciii.*, power is given to raise a sum of money by the creation of new shares for making this extension, and likewise to borrow on mortgage. If this money ought to have been raised by new shares or mortgage before the Company proceed to purchase land under their compulsory powers, this writ requires them to do so. We must assume that they can have no difficulty in performing their undertaking. On arguing the objection, we must assume that an obligation upon the Company exists to execute the work and to do all that is necessary for this purpose. They are in substance called upon to take all the steps necessary for the completion of the railway, in the order which the act of Parliament prescribes.

Upon the whole, it appears to me that the writ of mandamus is valid in form as well as in substance. And, the only return to it being that the Company, having taken no steps towards the making of the railway, are not bound to take any, I think there ought to be judgment for the prosecutor, with the award of a peremptory mandamus.

The case is certainly one of the most important ever argued in *Westminster Hall*; and it is attended with considerable difficulty. I therefore earnestly hope that as speedily as possible it may be brought by writ of error before a superior tribunal.

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COLERIDGE J. I am of the same opinion: and, as I have had the opportunity of reading and considering attentively both the judgments of my Lord now delivered, it is scarcely necessary for me to add more than my concurrence, to the conclusion to which he has come. And, speaking generally to the arguments and view of the authorities by which he has been led to it, I should merely waste time in an attempt to repeat the former, or reexamine the latter. In the case now for decision it seems to me perfectly clear that, if the writ discloses a *prima facie* case on which it can be supported, the return alleges nothing whatever to displace that case. The return can be no answer, unless *this* can be maintained, that the defendants may, by a representation to the Legislature, of which they are called on to prove the truth, that it will be a great public benefit that a railway should be constructed through a particular district and by a particular line, and that they are willing at their own expense so to construct it, procure from the Legislature all necessary powers, and most stringent they are, for that purpose; that by these powers they should at once, and for the whole number of years specified by the act, take from the landowners on the line the free use of their property, impede all improvements, prevent all sales; that they should indirectly but effectually prevent the district from the admitted benefit of having a railway constructed by other parties; and yet that they, having

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thus procured the powers, given the undertaking, and occasioned the inconveniences, above stated, may simply do nothing, retaining however all their powers for the times specified. In this case the defendants allege no inconvenience, no impossibility of making the line, no want of funds, means or time, so that the bare and single circumstance of their having done nothing is relied on to relieve them from the obligation of doing anything. The very statement of these circumstances seems to me sufficient to shew how entirely impossible it is to sustain this return.

The real question, then, is on the writ. And, after much consideration, and some hesitation, I am of opinion that it discloses a sufficient legal right in the individual promoting it, and a sufficient obligation on the defendants, to render it valid. It alleges that the whole of the projected line would pass through the townships of *Wooldale* and *Cartworth*; that Mr. *Hinchliff* was and is owner of lands in *Cartworth*, through which the line will pass; that these lands are shewn on the plans, and his name included in the books of reference; and that he is desirous the line should be made. He is, therefore, not merely interested as one of the public in the general benefits to result from the projected line; he is not merely one of the public on whose behalf the contract has been made for the construction of the railway; but individually he has been affected in his property by the acts of the defendants. Ever since the statute passed at their instance, they have exercised a controul over his lands, and he has been impeded in improving them, and substantially prevented from selling them. The only recompense for this is the specific performance of that which was originally contemplated by the parties and

intended to be provided by the Legislature: none other would be complete; and to this he has a legal right.

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I, therefore, agree with my Lord that our judgment should be for the Crown.

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LORD CAMPBELL C. J. stated that *Crompton J.* (who was not present) concurred in the judgment which he had pronounced.

ERLE J. intimated his opinion to be as in the preceding case; but delivered no further judgment.

Judgment for the Crown (a).

(a) See the next case.

The QUEEN *against* The GREAT WESTERN RAILWAY COMPANY.

Saturday,
November 20th.

(On the relation of LANGFORD and SMITH.)

MANDAMUS. The writ recited the provisions of "The Great Western Railway Amendment and Extension Act, 1847," (10 & 11 *Vict. c. ccxxvi.*, local and personal, public. Royal assent 22d *July* 1847.) (a). The writ then contained suggestions: That by warrant,

Mandamus to a railway Company to make a branch authorized by an extension Act, which incorporated stat. 8 & 9 *Vict.*

c. 18. Return: that the capital, required to make the branch, was not subscribed for by any contract, according to stat. 8 & 9 *Vict. c. 18. s. 16.*; and that the branch could not be made without the exercise of the compulsory powers to take land. On demurrer:

Held, that stat. 8 & 9 *Vict. c. 18. s. 16.* is not applicable to an extension Act, where the funds are to be furnished by the Company:

Held, also, that, even if stat. 8 & 9 *Vict. c. 18. s. 16.* were applicable, the return shewed no incapacity to obey the writ; as it did not aver that defendants were unable to procure the execution of the subscription contract.

It appeared on the record that the period for the exercise of the compulsory powers had expired, since the return and before the judgment.

Held, that a peremptory mandamus must be awarded, though, since the return, compliance had become impossible.

(a) The material sections of this act are the following. Sect. 1, after reciting that it was expedient to make a railway from the line of *The Great*

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granted under stat. 11 & 12 Vict. c. 3., the time for the completion of the work was extended for two years; and the time for the exercise of the powers for the compulsory purchase of lands was also extended for two years. That *The Great Western Railway Company* had entered on the lands: and that their powers for making the line by the compulsory purchase of lands could not be exercised after 22d July next after the date of the writ (22d July 1852): and that *Joseph Langford* and *Bartholomew Smith*, both proprietors of land on the proposed line, had requested *The Great Western Railway Company* to make the line, which they had refused and neglected to do. The writ then commanded *The Great Western Railway Company* "that, immediately after the receipt of this our said writ, you

Western Railway to the line of *The Wilts, Somerset and Weymouth Railways*, and that *The Great Western Railway Company* were willing to execute it, enacts that this railway when completed shall be part of *The Great Western Railway*. Sect. 2, that the provisions of "the Lands Clauses Consolidation Act, 1845," so far as applicable and "not inconsistent with the provisions hereinafter contained, shall be incorporated with and form part of this act." Sect. 4 enacts "that it shall be lawful for *The Great Western Railway Company* from time to time to raise, by creating new shares or stock, in addition to the sums of money which they are authorized to raise under and by virtue of the acts relating to their undertaking hereinbefore recited, or any of them, or which they may be authorized to raise under or by virtue of any other act to be passed in the present session of parliament, any sum of money not exceeding in the whole" 380,000*l.*, to be raised in the same way as provided by stat. 7 & 8 Vict. c. iii. (local and personal, public, on which nothing turned). Sect. 5 authorized *The Great Western Railway Company* to borrow on mortgage 126,660*l.* Sects. 11 & 13, in the common form, authorized the making of a branch line by *The Great Western Railway Company* from a point on *The Great Western Railway* to a point on *The Wilts, Somerset and Weymouth Railway*. By sect. 26 the powers of *The Great Western Railway Company* for the compulsory purchase of land were to expire three years after the passing of the act (that is on 22d July 1850). By sect. 27 the works were to be completed within seven years after the passing of the act (that is before 22d July 1854).

do without delay proceed to make and complete the said railway, commencing by a junction with *The Great Western Railway* in the parish of *Newton St. Loe* in the county of *Somerset*, and terminating by a junction with the line of *The Wilts, Somerset, & Weymouth Railway* in the parish of *Radstock* in the county of *Somerset*, by the said 'Great Western Railway Amendment and Extension Act, 1847,' authorized to be made. And that you do also, without delay, proceed to purchase the lands which are necessary, and which you require and are authorized to purchase, for the purpose of making and completing the said railway pursuant to the powers of the said last mentioned act of Parliament and the acts therewith incorporated."

Return (on 4th June 1852): That *The Great Western Railway Company* had not entered on the lands further than was necessary for a preliminary survey. "That we have not adequate or sufficient funds for the purchase of the lands necessary for making and completing the said railway; but, on the contrary thereof, at the time of the coming of this writ to us, we had not, nor ever before or since have we had, nor have we now, funds, or the power of raising funds, which by law we are authorized to apply, or which we can apply, for making and completing the said railway; save and except funds which are insufficient for making and completing the said railway by a very large sum, that is to say from 50,000*l.* to 100,000*l.* And we, the said *Great Western Railway Company*, further most humbly certify and return to our Sovereign Lady the Queen that the whole of the said capital of 380,000*l.*, in 'The Great Western Railway Amendment and Extension Act, 1847,' mentioned, has not been subscribed under any contract binding the parties thereto, their heirs, executors and

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administrators, for the payment of the sums by them respectively subscribed. And therefore it is not lawful for us to put in force any of the powers of the acts above mentioned, or any of them, in relation to the compulsory taking of land for the purposes of the said railway; and that, for the purpose of making and completing the said railway and purchasing the lands necessary for that purpose, it is necessary that we should have power to put in force the said powers in relation to the compulsory taking of land."

Plea: Traverse of the averment that the Company have not adequate or sufficient funds or the means of raising them. The Crown joined issue on this traverse (a).

To the residue of the return: Demurrer. Joinder in demurrer.

Fitzherbert, for the Crown. The general question, whether a railway Act is permissive merely, or obligatory on the promoters, must be considered as decided by *Regina v. York & North Midland Railway Company* (b) and *Regina v. Lancashire & Yorkshire Railway Company* (c), at least until the decision of this Court is reviewed in error. [*Wightman J.* I was not in Court when these cases were argued; nor did I hear the arguments in them. But I have carefully perused the judgments; and, so far as I am competent to form an opinion without hearing the case argued, I fully concur in the judgment of my Lord *Campbell*.] The only question open to discussion in this Court is as to the sufficiency of the

(a) The issue in fact was tried at the *Somerset Summer Assizes* 1852, before *Martin B.*; when a bill of exceptions was tendered by the defendant to the ruling of the learned Judge. The verdict passed for the Crown.

(b) *Ante*, p. 178.

(c) *Ante*, p. 228.

return. It is bad: as, even if sect. 16 of "The Lands Clauses Consolidation Act, 1845" (8 & 9 Vict. c. 18.), applies to such an undertaking as this, there is nothing in the return to shew that *The Great Western Railway Company* are unable, even now, to comply with that section. If they had averred that they could not procure a subscription contract to be executed, and so could not exercise their compulsory powers, it might, if sect. 16 applied, be a good return. That point is before the Court in *Regina v. Ambergate, &c., Railway Company (a)*. But such an averment would be material and traversable. It is, however, clear that sect. 16 of "The Lands' Clauses Consolidation Act, 1845," does not apply to the present Act. It is in terms made applicable "where the undertaking is intended to be carried into effect by means of a capital to be subscribed by the promoters of the undertaking." It is not applicable to an extension Act in which the capital is furnished by other means.

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Sir *F. Kelly*, Solicitor General, contra. Sect. 16 of "The Lands Clauses Consolidation Act, 1845," applies. The special Act authorizes the Company to raise the capital; by shares, it is true: but still section 16 applies. The Company are in this case the promoters; they are to furnish the funds; and they ought to execute a contract. There is a further point. Since the return was made, the 22d *July* 1852 has passed. It appears on the record that the compulsory powers to purchase land have expired. Can the Court, now, issue a peremptory mandamus commanding the Company to exercise those

(a) Argued on this day. The Court took time to consider their judgment, and did not deliver judgment in the present term.

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powers? It may be said that the expiration is a consequence of the improper delay of the Company. That may afford a reason for punishing those guilty of improper delay, if there be any, as for a contempt of Court; but it cannot render it proper to issue a peremptory writ commanding what on the face of the record is impossible.

Fitzherbert, in reply. The Company could not subscribe any contract. It would be ultra vires, and not binding; *Cohen v. Wilkinson* (a), *Colman v. Eastern Counties Railway Company* (b).

LORD CAMPBELL C. J. I am of opinion that in this case there must be judgment for the Crown. On the general question, whether there is an obligation to make a line for which an Act has been obtained, I think we must be governed by the judgments given in *Regina v. York & North Midland Railway Company* (c) and *Regina v. Lancashire & Yorkshire Railway Company* (d). I wish again to express my great desire that the first opportunity should be taken to have this very important and difficult question decided in the House of Lords: but, till the decision is reviewed, I must adhere to the opinions I then expressed. I must, therefore, assume in the present case that the writ is good, and that the only question is as to the sufficiency of the return. The part which we are now to consider rests entirely on "The Lands Clauses Consolidation Act, 1845," sect. 16. In the first place, I am of opinion

(a) 12 *Beav.* 125. 138.

(c) *Ante*, p. 178.

(b) 10 *Beav.* 1.

(d) *Ante*, p. 228.

that sect. 16 does not apply to such an undertaking as the one now in question. Is this, in the words of sect. 16, an undertaking "intended to be carried into effect by means of a capital to be subscribed by the promoters of the undertaking"? I am clearly of opinion that it is not. We need only refer to the special Act, which contemplates other means for carrying into effect the line. It is an extension Act; the line is to be made by *The Great Western Railway Company*, who may from other sources have sufficient funds for the purpose; but, in case they have not enough, the Act provides means by which they can raise additional capital. That is quite different from the state of things contemplated in "The Lands Clauses Consolidation Act, 1845," sect. 16. But, supposing that section did apply, still the return would be bad. It does not shew that the promoters are not able to procure the subscription to the contract. That is shewn in the return in *Regina v. Ambergate, &c. Railway Company (a)*, on which we have taken time to deliberate. But here the return is, merely, that the capital has not been subscribed. It is not said that *The Great Western Railway Company* have tried to have it subscribed and failed, nor that they were or are unable to have it subscribed. Even if the subscription was a condition precedent to their obedience to the writ, they shew no incapacity to obey. Therefore the return is bad. As to the last point: it admits of no doubt. If, when the writ issued, there was not time to obey it before the expiration of their powers, that should have been returned. Such returns have been made; the averment that there was not sufficient time has

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(a) Ante, p. 257, note (a).

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been traversed; and the issue on that point tried, and found against the defendants. But no such return was made here; and we must now assume that, when the writ issued, there was ample time to obey it. But in consequence of this bad return the time has passed. And now the Solicitor General argues that the defendants may take advantage of their own wrong in disobeying the writ. It is a good writ, and a bad return; and we are bound to award a peremptory mandamus.

COLERIDGE J. I shall say nothing on the general point, nor on the last point. But I wish to point out that the special Act incorporates only such parts of "The Lands Clauses Consolidation Act, 1845," as are applicable to and not inconsistent with its provisions. Now I think that, if *The Great Western Railway Company* were to execute such a contract as is contemplated in section 16, it would not be binding upon them. For the special Act points out (in sect. 4) the manner in which the Company may raise the funds. All they have to do is to obey this. Any other method in which they were to bind themselves to raise funds, as by a subscription contract, would be ultra vires, and not binding. I think therefore that sect. 16 is inapplicable to and inconsistent with the provisions of the special Act.

WIGHTMAN J. I agree with my brother *Coleridge* in what he has just said. It is clear that sect. 16 contemplates a different state of things from this. On the other points I concur with my Lord.

ERLE J. On the general point, I merely say that I

adhere to what I said in *Regina v. York & North Midland Railway Company (a)*, so far as it is applicable to the present case. With regard to sect. 16, I am clearly of opinion that the prohibition in that section does not apply to the powers given to *The Great Western Railway Company* by this special Act.

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Peremptory mandamus awarded.

(a) Ante, p. 178.

THE following order was this day made.

Monday,
November 22d.

IN pursuance of an Act, passed in the session of Parliament held in the 15th and 16th years of the reign of Her Majesty, c. 73., entitled "An Act to make provision for a permanent Establishment of Officers to perform the duties at Nisi Prius, in the Superior Courts of Common Law, and for the payment of such Officers, and of the Judges Clerks by Salaries, and to abolish certain Offices in those Courts:" We, the undersigned, being Two of the Commissioners of Her Majesty's Treasury, have caused the under mentioned Tables of Fees to be prepared, specifying the Fees proper to be demanded and taken in the Offices under mentioned, and at the Judge's Chambers, in the Superior Courts of Common Law; and that all other Fees in such Offices and Chambers should be abolished: namely:

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Offices of the Masters of the Three Superior Courts.

	£	s.	d.
Every writ (except writ of trial or subpoena)	0	5	0
Every concurrent, alias, pluries or renewed writ - - - - -	0	2	6
Every writ of trial - - - - -	0	2	0
Every writ of subpoena before a judge or master - - - - -	0	2	0
----- before the sheriff - - - - -	0	1	0
Every appearance entered - - - - -	0	2	0
----- each defendant after the first	0	1	0
Filing every affidavit, writ, or other proceeding	0	2	0
Amending every writ, or other proceeding - - - - -	0	2	0
Every ordinary rule - - - - -	0	1	0
Every special rule, not exceeding 6 folios - - - - -	0	4	0
----- exceeding 6 folios, per folio	0	0	6
<i>Note.</i> —Plans, sections, &c., accompanying rules, to be paid for by the party taking the rule, according to the actual cost.			
Every judgment by default - - - - -	0	5	0
Every final judgment, otherwise than judgment by default - - - - -	0	10	0
Taxing every bill of costs, not exceeding 3 folios - - - - -	0	2	0
----- exceeding 3 folios, when taxed as between party and party, per folio - - - - -	0	0	6
----- exceeding 3 folios, when taxed as between attorney and client, or where the attorney taxes his own bill, per folio - - - - -	0	1	0

	£	s.	d.	1852.
Every reference, inquiry, examination, or other special matter, referred to the master, for every meeting, not exceeding one hour	0	10	0	
————— for every additional hour, or less - - - - -	0	10	0	
Upon payment of money into court, viz :—				
for every sum under 50 <i>l.</i>	0	5	0	
50 <i>l.</i> and under 100 <i>l.</i> -	0	10	0	
100 <i>l.</i> and above that sum	1	0	0	
Every certificate - - - - -	0	1	0	
Office copies of præcipe, or other proceedings, per folio - - - - -	0	0	6	
Every search, if not more than two terms -	0	0	6	
————— exceeding two, and not more than four terms - - - - -	0	1	0	
----- exceeding four terms, or a ge- neral scarch - - - - -	0	2	6	
Every affidavit, affirmation, &c. taken before the master - - - - -	0	1	0	
Filing every recognizance or security in eject- ment or error - - - - -	0	2	6	
Every allowance and justification of bail -	0	3	0	
For taking special bail as a commissioner -	0	2	0	
Filing affidavit, and inrolling articles previous to the admission of an attorney -	0	5	0	
Every readmission of an attorney -	0	5	0	

All other fees than those before men-
tioned are hereby abolished, and are
not to be taken by any person in the
masters' offices, under any pretence
whatever.

1852.

Offices of the Associates to the Three Chief Judges.

	£	s.	d.
Every record of Nisi Prius, delivered to the Associate, to be entered for trial	-	1	5 0
Every trial of a cause from plaintiff	-	1	0 0
----- from defendant	-	0	15 0
----- If the trial continues more than one day, then for every other day, from plaintiff and defendant, each	-	0	10 0
Returning the postea - - - - -	-	0	5 0
Every cause made remanet, at the instance of the parties, to be paid by plaintiff or defendant, as the case may be - - - - -	-	0	10 0
Every cause withdrawn, to be paid by the party at whose instance it is withdrawn	-	0	5 0
Re-entering every record of Nisi Prius, made remanet, &c. - - - - -	-	0	2 0
Every reference, from plaintiff and defendant, each - - - - -	-	0	5 0
Every amendment of any proceeding whatever - - - - -	-	0	2 0
Every order or certificate - - - - -	-	0	5 0
Every special case, or special verdict, in addition to the charge for ingrossing and copying, at the rate of 4d. per folio, from plaintiff and defendant, each - - - - -	-	0	10 0
Attending any court or otherwise, with any record, or other proceeding, under writ of subpœna, or special order of court, per day	1	0	0
All other fees than those before mentioned are hereby abolished, and are not to be taken by any person in the Associates' offices, under any pretence whatever.			

Chambers of the Chief and Puisne Judges.

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	£	s.	d.
Every summons to try an issue before the sheriff - - - -	0	1	0
Every other summons whatever, whether in term or vacation - - - -	0	2	0
Every order to try an issue before the sheriff	0	1	0
Every other order whatever of an ordinary nature - - - -	0	2	0
Every order of a special nature, such as: reference to arbitration, or attendance of witnesses at arbitration; service of process on persons residing abroad; reference to the master to fix sum for final judgment; revival of judgment, and the like -	0	5	0
Every fiat, warrant, certificate, caveat, special case, special verdict, or the like -	0	5	0
Every affidavit, affirmation, &c. whether in term or vacation, each deponent -	0	1	0
Every affidavit kept for the purpose of being conveyed to the proper office to be filed -	0	1	0
Every proceeding filed - - - -	0	2	0
Every admission of an attorney - - - -	1	0	0
Every approbation of commissioners for taking affidavits or special bail - - - -	0	2	6
Every commission for taking affidavits or special bail, exclusive of stamp duty, ingrossing and sealing - - - -	1	0	0
Every other commission for any purpose whatever, exclusive of stamp duty, ingrossing and sealing - - - -	0	10	0
Every acknowledgment by married women -	0	10	0

1852.		£	s.	d.
	Office copies of judge's notes, or of any other proceeding whatever, per folio -	-	0	0 6
	Every recognizance or bond of any description whatever -	-	0	10 0
	Every allowance of writ of error -	-	0	10 0
	Bail on cepi corpus, habeas corpus, error or ejectment -	-	0	2 0
	Delivering bail piece off the file, or justification of bail -	-	0	2 0
	Every committal -	-	0	5 0
	Every exhibit signed by judge -	-	0	1 0
	Producing judge's notes -	-	0	5 0
	Bill of exceptions signed by judge -	-	0	5 0
	Order in legacy duty cases -	-	0	5 0
	Crown revenue cases, from defendant -	-	0	5 0
	Attendance in any court, or otherwise, under subpœna or special order of court, to give evidence, or produce documents, per day	1	0	0
	Attendance as a commissioner to take affidavit, &c., or at a judge's house, or elsewhere, at request of parties -	-	0	10 0
	Appointment of commissioners under glebe exchange -	-	1	0 0
	Allowance of by laws or table of fees -	-	1	0 0
	Report on private bill -	-	5	0 0
	Attendance by counsel, each side -	-	0	5 0

Note.—All plans, sections, &c., accompanying any order or office copy, to be paid for by the party, according to the actual cost.

In cases where the party has been allowed to

sue in formâ pauperis, the fees are not to be demanded or taken, nor in cases where such fees would be payable by any Revenue or other Government Department. 1852.

All other fees than those before mentioned are hereby abolished, and are not to be taken by any person at the Judge's Chambers under any pretence whatever.

Given under our hands at the Treasury Chambers, Whitehall, this twentieth day of November 1852.

<i>Chandos.</i>	} Two of the Commissioners of
<i>Thos. Bateson,</i>	
	} Her Majesty's Treasury.

We, the undersigned Judges of the Superior Courts of Common Law, do settle, allow and sanction the before mentioned Table of Fees prepared by the Commissioners of Her Majesty's Treasury; and we do hereby establish the same, under the provisions of the aforesaid Act.

Dated the twenty-second day of *November*, 1852.

<i>Campbell,</i>	{ Lord Chief Justice of the Court of Queen's Bench.
<i>John Jervis,</i>	
<i>Fred. Pollock,</i>	{ Lord Chief Baron of the Court of Exchequer.
<i>W. H. Maule,</i>	
<i>E. V. Williams,</i>	{ Judges of the Court of Common Pleas.
<i>T. N. Talfourd,</i>	

The before mentioned Tables of Fees having been sanctioned and allowed by the Lord Chief Justices, the Lord Chief Baron, and other Judges, as required by the

1852. said Act, we do hereby order that the said Tables of Fees be inserted and published in *The London Gazette*.

Treasury Chambers, *Whitehall*, the twenty-second day of *November*, 1852.

Chandos, } Two of the Commissioners
Thos. Bateson, } of Her Majesty's Treasury.

The above table was inserted in the *Supplement to The London Gazette of Tuesday*, 23d *November*, 1852.

Tuesday,
November 22d.

The QUEEN against JOHN HENRY NEWMAN, D.D.

Where a new trial is to be moved for by the defendant in a criminal case, intimation must be given to the Court, during the first four days of term, that the party is prepared to move.

Where, to a criminal information for a libel, defendant has justified, under stat. 6 & 7 *Vict. c. 96. s. 6.*, asserting the truth of the imputations contained in the alleged libel, it is not competent to

him to prove, in support of the plea, that the same charges were previously published in another publication, and that the prosecutor had taken no steps against such other publication.

THIS was a criminal information, charging the defendant with composing and publishing a libel upon *Giovanni Giacinto Achilli*. The libel, as set out in the information, contained imputations of seduction, adultery, infidelity, hypocrisy, speaking against the moral law, and other offences, and that *G. G. A.* was "prohibited from preaching and hearing confessions."

Pleas: 1. Not guilty. Issue thereon.

2. A plea (*a*) asserting, with particulars, the truth of the several imputations; and, as to that last mentioned, that, "before the said composing" &c., "to wit on" &c., "in parts beyond the seas, to wit at *Rome*, to wit at *Westminster*" &c., "by the judgment and consideration of a certain ecclesiastical Court there, to wit *The Court of*

(a) See stat. 6 & 7 *Vict. c. 96. s. 6.*

the Holy Office or Inquisition, being a Court having lawful jurisdiction and authority in that behalf, the said *G. G. A.* was for ever suspended from the celebration of mass, and disabled from any cure or direction of souls, and from preaching and hearing confessions, and from exercising the sacerdotal office." The plea alleged generally "that the said alleged libel consists of allegations true in substance and in fact, and of fair, just and reasonable comments thereon." Averment that "it was for the public benefit that the matters in the said alleged libel contained, and therein charged against the said *G. G. Achilli*, should be published; because" &c. (stating facts in support of the averment). Justification of the publication for the causes aforesaid: verification. Repliation: That the defendant of his own wrong, and without the cause in the second plea alleged, composed and published &c.: conclusion to the country. Issue thereon.

On the trial, before Lord Campbell C. J., at the *Middlesex* sittings after last *Trinity* term, the defendant admitted the composing and publishing the alleged libel; and the prosecutor admitted that, if the imputations were true in fact, it was for the public benefit that the alleged libel should be published. Evidence was given on both sides as to the truth or falsehood of the imputations. For the defendant, it was proposed to give in evidence a book called *The Dublin Review*, which, it was suggested, had been published some time before the application for this information, and contained imputations identical with those contained in the alleged libel. The Lord Chief Justice rejected this evidence. The jury found that the imputation of the suspension and disabling by the Inquisition was proved, but that none of the other imputations were proved. The Lord Chief

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1852. Justice then directed a verdict for the Crown on both
 The QUEEN issues. Verdict accordingly.
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Sir *F. Thesiger*, Attorney General, having now moved for judgment,

Sir *A. J. E. Cockburn* moved for a new trial, on the ground of the rejection of the evidence as above stated. [Lord *Campbell* C. J. The usual course has been to mention the case in the first four days of term, if a counsel is prepared to move for a new trial.] It must be admitted that the defendant's counsel was not so prepared in this instance: but the practice has not been uniform; *Rex v. Holt* (a): and the question is one merely of form. The Court will not be bound by the supposed rule, if it appear that justice has not been done.

LORD CAMPBELL C. J. The Court see the great inconvenience which may arise from the course now proposed: but, as no absolute general rule has been laid down, we will by no means shut out the present defendant from making the application. But it must be understood that, for the future, when a new trial in a criminal case is moved for, an intimation must be given on one of the first four days of term that counsel is prepared to make the motion.

COLERIDGE, WIGHTMAN and ERLE Js. concurred.

Sir *A. J. E. Cockburn*. The evidence should have been admitted. It was a fair topic to be urged to the jury that, unless the imputations had been true, the party now complaining would have proceeded against

the first publisher. [Lord *Campbell* C. J. It struck me, at the time, that this might be exceedingly unfair to the prosecutor; because, upon the same principle, evidence might be given of other publications also, and an injurious impression be made on the minds of the jury.] The fact that a man had submitted to an imputation, in whatever form conveyed, which had come to his knowledge, is surely, as against him, some evidence that he was conscious of its truth. [*Erle* J. Do you put it as an universal proposition that, wherever there is a justification, an anterior libel may be proved?] Not as an universal proposition: the limit is, where the earlier publication is such as to shew that the party complaining had tacitly acquiesced in the truth of the identical charge complained of. [*Erle* J. That would apply to every anterior libel which contained the same imputation and had not been prosecuted.]

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COLERIDGE J. I am entirely of the opinion which has been intimated by my brother *Erle*. The direct issue was the truth of the charge contained in the libel. It will be admitted that a statement made by any third person as to the truth of such charges is not direct proof of the truth. But it is sought to put in the evidence on the ground of the conduct of the party now complaining, he having had knowledge of the first publication and having submitted to it. Now, in the first place, I must observe that not every thing which might occur to a person, as morally tending to prove one way or other, is receivable in evidence in a court of justice, upon a limited issue. The strongest proof of this is the extent to which the doctrine might be pushed. Exactly on the

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same principle, it might be urged that this charge in *The Dublin Review* is true because, some time before, it was made in another publication. The answer is, that this is all much too vague to be received as evidence in a court of justice. Apply that to the present case. It is said that you are to infer the truth of the statement made by one set of witnesses against the statement made by another set, because the same circumstances with respect to the same party have been stated before, and that, this having been brought to the knowledge of the party, he submitted. The fallacy is in the word "submission." It comes to this only, that he did not prosecute. There may have been many reasons for that: the anonymous nature of the article, the inability to fix on any particular person, the ignorance whether the charge proceeded from a man of character, the poverty of the party himself, and many other circumstances that might be suggested, preventing a man from instituting proceedings in a court of justice on the first occasion on which the charge was made.

WIGHTMAN J. I am entirely of the same opinion. As I understand Sir *Alexander Cockburn*, he contends that, as evidence to prove the truth of the second plea, he is at liberty to shew that a similar libel, in similar terms, was previously published in some other work, and that no proceedings had been taken in consequence; and that the inference from this is, that there was some truth in the charges. It seems to me that this would be infinitely too vague. All the inconvenience pointed out by my brother *Coleridge* would arise. The evidence would manifestly lead to an inquiry which could hardly,

in any view of the case, be satisfactory, as to the reasons why a prosecution in the particular case was not instituted.

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Lord CAMPBELL C. J. and ERLE J. concurred.

A rule was afterwards granted to shew cause why a new trial should not be had, on the ground of the verdict being against the weight of evidence.

The QUEEN *against* EVERETT, Esq., Judge of the County Court of DORSETSHIRE, holden at POOLE.

Tuesday,
November 23d.

(In the matter of WILLIAM ADEY and CHARLES ADEY, *against* the Deputy Master of The Trinity House, DEPTFORD STROUD.)

WILLES, in this term, obtained a rule calling on the plaintiffs in the above plaint, which was in the county court of *Dorsetshire*, to shew cause why a prohibition should not issue. From the affidavits on both sides, it appeared that the plaintiffs were owners of the brig *Freedom*, which sailed on a voyage from *Poole* to *Memel* and back. On her outward voyage, the owners paid 1*l.* 4*s.* 10½*d.* to the collector of customs at the port

Stat. 32 G. 3. c. 74. authorizes trustees to take a tonnage rate on each ship passing *Hornsgate*, and not producing a receipt testifying the payment before on that voyage. The owners of a ship, bound on a voyage

out, and home, having been compelled to pay two sets of rates, due on two voyages, as if the voyage out and that home had been separate voyages, brought a plaint in the county court to recover the amount last paid. They admitted that the trustees were entitled to a rate on each voyage, but alleged that the voyage out and home was one voyage. On a rule for a prohibition:

Held, That the rates were "toll" within stat. 9 & 10 Vict. c. 95. s. 58., and that the "title" to the toll was in question in the plaint, and the county court had no jurisdiction. Rule absolute for a prohibition.

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of *Poole*, as the amount of the rates due on that voyage to the trustees, under stat. 32 G. 3. c. 74. (a), and received a receipt for the payment. On her return, the same sum was demanded and paid under protest. The plaint was brought against the deputy master of the *Trinity House, Deptford Stroud*, to recover this latter sum as money had and received by his agent, the collector of customs at *Poole*, the same having been paid under protest, as having been paid before.

It appeared by the affidavits that there was no dispute

(a) "For the maintenance and improvement of the Harbour of *Ramsgate*, in the county of *Kent*; and for cleansing, amending, and preserving the haven of *Sandwich*, in the same county."

The act creates commissioners who are made trustees for the purpose of carrying it into effect. Sect. 8 enacts "that the said trustees" "are hereby authorized to settle and impose the several rates and duties herein-after mentioned," to commence on 25th June 1792; "that is to say, any rate or duty not exceeding 3d. per ton to be paid by the master or owners for every ship, vessel, or trader, of the burthen of twenty tons or upwards, and not exceeding the burthen of three hundred tons, whether the same be laden or in ballast, passing from, to, or by *Ramsgate*, whether on the east or west side of the *Goodwin Sands*, or otherwise passing by or coming into the harbour there (other than and except ships laden with coals, grindstones, or *Purbeck, Portland* or other stones), not having a receipt testifying his payment before on that voyage; and for every ship, vessel, or trader, which shall exceed the burthen of three hundred tons, any rate or duty not exceeding 1d. for each ton of such ship (except ships laden with coals, grindstones, *Purbeck, Portland*, or other stones), and for every chaldron of coals, or ton of grindstones, *Purbeck, Portland*, or other stones, a rate not exceeding three halfpence; and the said duties shall be paid every time such ship, vessel, or trader shall sail from, arrive, or come into harbour at, or pass by *Ramsgate* as aforesaid (except as hereinafter is mentioned); and such rates or duties, when settled by the said trustees, shall be forth-with published in the *London Gazette* for the information of all parties concerned; the same to be paid to the customer or collector of the customs, or their deputies, or such other person or persons as shall be appointed by the trustees of this act to receive the same, in such port or place whence such ship, vessel, or trader shall set forth, or where such ship, vessel, or trader shall arrive, before she sails from such port on her outward-bound voyage. and before unloading the goods on board on her homeward bound voyage."

in the County Court, as to the right of the trustees to receive 1*l.* 4*s.* 10½*d.* from the owners of the vessel on each voyage: but the point made by the plaintiffs was that a voyage out and home was but one voyage within the meaning of stat. 32 *G. 3. c. 74*. The trustees contended that the voyage out and the voyage home were separate voyages. It was stated in the affidavits that the annual amount of the dues exceeded 18,000*l.*

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Barstow shewed cause. The rule has been obtained on the ground that the title to a toll was in question within the meaning of the proviso in stat. 9 & 10 *Vict. c. 95. s. 58*. The words in that proviso are: "that the court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question." "Toll" in that act must be taken as meaning tolls in the nature of the things with which it is classed, franchises and incorporeal hereditaments; it does not include dues such as the present. Even if this be toll, the title to it does not come in question. It is as if the collector at a turnpike gate denied that a carriage had passed through that day, and the owner asserted it had: no one could say that the title to the toll was in dispute there. The question is, whether the ship-owner has been in fact subject to the toll, the title to which is admitted. This view appears to be confirmed by the construction put by the Court of Common Pleas on both the words "toll" and "title;" *Hunt v. The Great Northern Railway Company (a)*.

Bramwell and Willes, contra. The amount claimed

(a) 10 *Com. B.* 900.

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being under 5*l.*, the plaint cannot be removed by certiorari; stat. 9 & 10 *Vict. c. 95. s. 90.* And, as the amount is less than that to which jurisdiction is given by stat. 13 & 14 *Vict. c. 61.*, no appeal lies under sect. 14 of that latter act. Unless, therefore, the case is within the exception in stat. 9 & 10 *Vict. c. 95. s. 58.*, disputes as to dues, which, it appears, amount to many thousands a year, must be finally and without appeal disposed of in a small debts' court. It is said these dues are not "tolls." The things to which they bear most analogy are the lighthouse dues, which are always called tolls: and the word in the statute is to be taken in the popular sense. But, even in its most technical sense, toll includes a charge on merchandize payable to the owner of a port; *Com. Dig. Toll (A).* In *Hunt v. The Great Northern Railway Company* (a) the matter in question was the right to payment for the supply of motive power; that was in the nature of a debt for work and labour, not for toll in any sense. The more serious question is, whether the title to the toll comes in question. [*Coleridge J.* It is expressly conceded that the trustees are entitled to the tolls; but it is said no toll is due on the home voyage. Can it then be said that the title to the toll is in dispute, when it is the existence of the toll which is denied?] To make title to any incorporeal thing, which does not exist as of common right, it is essentially necessary to shew that it exists. The party making title to a franchise granted by the Crown must begin with the grant of the franchise to his ancestor, which is part of his title; and any denial of that grant puts his title in issue. Could it, for instance, be said that the

(a) 10 *Com. B.* 900.

County Court could try a trespass, where the plaintiff insisted on a free warren of which the defendant denied the existence? That was the case in *Earl of Carnarvon v. Villebois (a)*, in which very difficult questions of title arose. If it had, in that case, been admitted that free warren extended over the manor, and the dispute had been whether there was a trespass within or out of the manor, it would have been a question of fact, not involving title. So in the case, put in the argument on the other side, of the turnpike man claiming toll from a carriage which had already passed through the gate that day, if the dispute was whether the carriage had previously passed through the turnpike, the title to the toll would not be in question; but, if the claim was to toll on the carriage, whether it had previously passed or not, and it was denied that the toll was due on the second passage, the title to the toll would be in question. [*Erle J.* Put it in the form of a syllogism. *A.* is entitled to toll from all persons in such and such circumstances: *B.* is in these circumstances: therefore *A.* is entitled to toll from *B.* You say, if *B.* denies the major, the title to the toll is in question; if *B.* admits the major but denies the minor, the title to the toll is not in question.] Yes. The decision on the major will govern other cases; the decision on the minor governs only that one; and that suggests a sound reason for allowing the latter to be decided by the inferior court. Here the question is, not as to whether the ship had passed *Ramsgate*, but whether, having passed under circumstances as to which there is no dispute, toll is due.

Lord CAMPBELL C. J. I am reluctantly compelled

(a) 13 M. & W. 313.

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to say that the rule must be absolute. I should have been much better pleased if a claim for so small an amount could be speedily and cheaply determined in the County Court: but it seems to me that the exception in stat. 9 & 10 *Vict. c. 95. s. 58.* expressly extends to this case, in which the title to toll is denied, because the existence of the toll as applicable to the particular voyage is denied. If we were to construe the statute so as to give the County Court jurisdiction wherever it was admitted that the title to all the tolls that existed was in a particular person, we might call on that Court to try the most difficult questions of title. There formerly were difficult cases depending on exemptions from tithe; it would have been easy in those cases to shape the proposition as Mr. *Bartow's* clients now do, and to say, "We admit that the rector is entitled to all tithes that exist, but no tithe does exist:" yet we all know that such cases gave rise to more complicated and difficult questions of title than almost any others.

COLERIDGE J. I also am of opinion that the title to toll is in question. The word "title" may, in one sense, be confined to the right to what exists, without including the question of its existence: but in ordinary language it includes both; and I think that in stat. 9 & 10 *Vict. c. 95. s. 58.* it is so used. I have never doubted that the dues in this case are tolls. That which they most resemble is a lighthouse due, which is always spoken of as a toll.

WIGHTMAN J. I did for some time doubt whether the title to toll came in question in this plaint: but, on consideration, I agree that, giving the words "title" and "toll"

an extended sense, it does. For the question involves the very existence of one of the tolls claimed, and so involves the title of the trustees to that toll.

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ERLE J. Using the words in their ordinary sense, I think the title to the toll does come in question. The plaint is to recover back the money paid. If the case were reversed, and the trustees were suing the Messrs. *Adey* for the toll, the question would really be the same. Now, if, in such a suit, a special case were prepared, stating all the facts, would it not fairly and properly conclude: "The question for the Court is, whether under these circumstances the trustees are entitled to toll from Messrs. *Adey*?" I think it would.

Rule absolute.

DOE, on the several demises of THOMAS SMITH
CHILD and HANNAH, his Wife, and of THOMAS
SMITH CHILD, *against* Roe.

Tuesday,
November 23d.

STAMMERS moved for a rule calling on *George William Wright*, the tenant in possession, to shew

Ejectment for a house. The tenant in possession took out a summons

to inspect two leases. No affidavits were used before the Judge; but it was stated, for the tenant, that he was in possession as a lawful occupant of the house, and that the lessors of the plaintiff, who were owners of the reversions expectant on two leases, comprising a considerable district of which the premises were part, sought to recover on the ground that they had a right of entry for breaches of covenants alleged to be contained in the leases which the tenant sought to inspect. The attorney for the lessors of the plaintiff, without either denying or in terms admitting the statement, argued that the Judge had no authority to make an order to inspect. The Judge made the order, on the assumption that the statement, not being disputed, was admitted to be true in fact. On a motion for a rule to set aside this order:

Held: 1st. That the affidavits must disclose what were the admissions before the Judge on which he made his order.

2d. That the order was properly made in exercise of the common law powers of the Court; the tenant appearing, by the tacit admissions before the Judge, to have an interest in the deeds which he sought to inspect.

1852.

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cause why an order made in this cause by *Erle J.* should not be rescinded. The following facts appeared by the affidavit upon which the motion was made. Declarations in ejectment were, on 18th and 19th *May*, served on the occupants of many houses in *Bethnal Green*, for the purpose of recovering possession of a large property there, held under two long leases, which, it was alleged, were forfeited for breaches of covenant. *George William Wright* appeared on 24th *May*, and entered into the consent rule to defend for one of those houses. Under an order of *Wightman J.*, made on 9th *June*, the lessors of the plaintiff furnished *Wright* with particulars of the breaches of covenant on which he relied as forfeitures, and with the particulars of the deeds in which the covenants were contained. These deeds were two: first, a lease of 15th *August* 1803, by *Peter Gascoigne* to *Saunderson Turner Sturtevant*; secondly, a lease of 15th *October* 1806, by *John Bood* to *Saunderson Turner Sturtevant*. A summons was taken out to shew cause why the tenant should not have liberty to inspect the two documents. On the hearing, before *Erle J.*, on 1st *July*, the learned Judge adjourned the further hearing until the 5th day of this term; and, on 15th *November*, made the following order. "*Doe dem. Child & others v. Roe (Wright, tenant)*. Upon hearing the attorneys and agents on both sides, I do order that *George William Wright*, the tenant of the premises, or his attorney, shall be at liberty to inspect the two several leases of 15th *August* 1803 and 15th *October* 1806, and take copies thereof, and make extracts therefrom; and that, in the meantime, all further proceedings be stayed." The affidavit then stated that the lease of 1803 comprised about 200 houses; and that the lease of 1806, which was

a sublease, comprised about 60 houses, part of the 200. That the lessors of the plaintiff were entitled, as devisees of *Peter Gascoigne*, the original lessor, to a large estate at *Bethnal Green*, of which the 200 houses formed part; and that *Thomas Smith Child* was assignee, for value, of the estate of *John Bood*, the sublessor in the deed of 1806. [*Erle J.* I made this order on the ground that *Wright* was not a mere trespasser, but a person holding his house rightfully from the original lessee, and so having an interest in the lease. I cannot say whether that was proved before me, or whether it was, as is more common at Chambers when there is no real dispute as to the facts, tacitly assumed by all parties. But I am quite sure that I explained to the parties that I made my order solely on that ground; for I was rather inclined to think that the order could not be made under stat. 14 & 15 *Vict. c. 99. s. 6.*, though, after much consideration and consulting such of my brethren as I could see in the vacation, I thought the order might be made at common law. Lord *Campbell C. J.* We cannot review a judge's order unless we have before us the materials on which the judge decided. The present affidavit is defective in that respect. You may renew your application on fresh affidavits, shewing what were the materials laid before my brother *Erle* at Chambers. If affidavits were then used, what they were, or, if the Judge proceeded on admissions, what they were.]

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Stammers, on the ensuing day (*November 24th*), renewed his application. He produced additional affidavits, by which it appeared that no affidavits had been used at Chambers: and the attorney who had appeared before *Erle J.* in opposition to the summons deposed

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that he was entirely ignorant of the title of *Wright*, and had in no way intended to admit it, nor had, to the best of his recollection, done so; except in so far that the summons was taken out in the name of "*Wright*, tenant of the premises;" and that, when before *Erle J.*, he did not deny that *Wright* was so, but opposed the order on the ground that the deeds were part of the title of the lessors of the plaintiff.

Stammers, in support of his application. The order is not justified by stat. 14 & 15 *Vict. c. 99. s. 6*. By a bill of discovery, *Wright* could obtain a discovery of documents which form part of his case; but he could not obtain a discovery of those which form part of the case of the other party; *Hare on Discovery*, 197; *Bolton v. Corporation of Liverpool* (a). The two deeds in question form part of the case of the lessors of the plaintiff. [*Erle J.* I did not act under stat. 14 & 15 *Vict. c. 99*. Before me, one party stated, and the other did not deny, that *Wright* was in lawful occupation of one of the houses held under the leases. Under that state of facts I thought he was so far privy to the leases as to be entitled to an order to inspect them under the common law jurisdiction.] He may be in lawful occupation without being in any way a party to the lease. The cases in which the Court at common law will grant an inspection are very few. In *Lush's Practice*, p. 747, it is said: "The person seeking the production of the instrument must be a party thereto either in fact or in interest." Here *Wright* is not shewn to be a party to the deed in any way. There is no precedent of an inspection having been ordered in such a case as the present.

(a) 3 *Sim.* 467; 1 *Mytne & K.* 88.

Lord CAMPBELL C. J. I am of opinion that this order was most properly made. I am very far indeed from laying down the rule that a defendant would have a right to inspect the documents if he were a stranger to them. But we are to look at the facts as they appeared before the Judge on the admissions made before him: and, looking at those, it is clear that the order was properly made in exercise of the common law jurisdiction of the Court. It appears to have been admitted before the Judge that the lessors of the plaintiff represent the original lessor of the premises; and that he brought ejectment to recover them on the ground of alleged breaches of the covenants contained in the lease. It was a necessary part of the case for the lessors of the plaintiff that the house held by *Wright* was held under that lease, and that there was possession of that house by some one who, by payment of rent or otherwise, was so connected with the lease as to be affected by it, and by the breaches of covenant committed in other premises held under that lease. And it was not disputed that the tenant's statement, that he was not an intruder, was true. Substantially then this ejectment is an action brought upon the lease against a person who derives from that lease title to part of the premises. If it were an action of covenant against an assignee, might not the Court order an inspection, supposing it was not made unnecessary by profert? If it might have been done in an action of covenant on the lease to recover damages for a breach of covenant, it may also be done in an action of ejectment brought to turn the tenant out of possession for a breach. Then, if there be power to make such an order, is it not perfectly fair that, if the tenant has no counterpart of the deeds, he should be

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permitted to inspect these deeds, and ascertain what the covenants are, so as to learn whether he ought to defend the ejectment or submit to it? I give no opinion as to whether this order is authorized by stat. 14 & 15 *Vict. c. 99*. It is authorized by common law.

WIGHTMAN J. I also think that this order was properly made under the common law jurisdiction of the Court, and that it is unnecessary to consider whether it might not also be authorized under stat. 14 & 15 *Vict. c. 99*. The ejectment is brought to recover the houses for a breach of covenant in the lease. In order to recover on that ground, the lessor must in some way connect the tenant with the lease. He must in some way shew that he came in under it, so as to be affected by the breaches of the covenants in it: and before the Judge both parties assume that such is the state of the facts, and that the tenant was not a mere intruder, but came in derivatively from those who held under the lease. That being so, it brings him within the principle of the rule, as stated in *Lush's Practice*, p. 747. The tenant has a direct interest in the deeds; for they are leases under which he holds. It is sought to turn him out of possession for breaches of what are alleged to be covenants in those deeds. He has no counterpart; and it much concerns him to see these deeds.

ERLE J. When there is only one copy of an instrument on which an action is brought, and each party has an interest in that instrument, it is the general rule that the Court will order an inspection of that instrument. I thought that the facts, as admitted before me, brought the case within this principle. The statement on behalf

of the tenant, which was not disputed, was, that he took the house from one who had apparent right to let him into possession. Then a declaration in ejectment was served in the name of persons of whom he never heard. He went to inquire what was the reason of this, and was informed that the lessors of the plaintiff were the representatives of the original ground landlord, and that they had a right of entry on account of breaches of covenants contained in the lease. The tenant inquires what covenants, and whether the breaches are alleged to be on his premises. He is informed that the lease comprises 200 houses; that some one, he is not told who, has broken covenants contained in a lease which he never read; and that the lessor of the plaintiff will tell him nothing. It is a rule prescribed by justice, that a defendant ought to have notice what the case made against him is: and it seemed to me that, if ever there was a case in which justice required that there should be an inspection, this was the case. I thought that, if I had jurisdiction to order an inspection, it should be exercised to the full extent; and it seemed to me that the common law jurisdiction of the Court authorized the making of the order.

Lord CAMPBELL C. J. added: This common law jurisdiction of the Court is likely in future to be of much greater practical importance than formerly. In a large number of cases to which it would have applied, the necessity for its exercise was superseded by profert. Now that, by stat. 15 & 16 *Vict. c. 76. s. 55.*, the Legislature has abolished profert without providing any substitute, it becomes highly important to lay down the

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rule that, where an action is brought on an instrument, the Court has power to order an inspection of it.

Rule refused.

See *Bluck v. Gompertz*, 7 Exch. 67.

Tuesday,
November 24th.

In the Matter of EMANUEL BARTHELEMY and
PHILIP EUGÈNE MORNEY.

See *antè*, p. 8.

Thursday,
November 25th.

The QUEEN against ASHTON.

Stat. 9 G. 4.
c. 61. s. 21.
subjects persons licensed under that Act to a penalty, on conviction before justices, for any offence against the tenor of the license: the license (Schedule C.) provides that the person licensed "do not knowingly suffer any unlawful games or any gaming whatsoever" in the inn, &c.

An information charged a person licensed, that he did "knowingly suffer a certain unlawful game, to wit the game of Dominoes, to be played" in his house.

Held, That the information charged no offence within the section: and, the party having been convicted, the Court granted a certiorari to remove the conviction.

ARCHBOLD, in last *Trinity* term, obtained a rule calling on *James Timmins Chance* and *Archibald Kenrick*, Esquires, justices for *Staffordshire*, to shew cause why a certiorari should not issue, to remove into this Court a record of conviction whereby *Richard Ashton*, licensed victualler, was, on 29th *May* in this year, convicted by them in the penalty of half a crown, for suffering an alleged unlawful game, called Dominoes, to be played in his house, against the tenor of his licence. On the ground that such game is not unlawful.

The rule was obtained on the affidavit of *Ashton*, who deposed to the fact of his conviction "for suffering an alleged unlawful game, called Dominoes, to be played in his house." That he had taken out, and still held, a

license for selling beer and spirits in his said house, which was a public house; that he was advised and believed that a conviction for suffering what is alleged in the same conviction to be an unlawful game called Dominoes is not a legal conviction, inasmuch as the said game is not by law prohibited, and is not an unlawful game: and that, furthermore, it was not proved, or attempted to be proved, that any stake whatever was played for at the time in question. He also denied the fact of any game having been played. The affidavits in answer were merely as to the fact of evidence having been given that the game had been played. The affidavits did not, on either side, set out any conviction or information: but the counsel opposing the rule produced the information in Court, on the argument; and it was referred to without objection. It was dated 11th *May* 1852, and was preferred before a justice of *Staffordshire*. It charged that *Richard Ashton*, of &c., "being the keeper of an ale house and victualling house, and having a license to sell exciseable liquors by retail, to be drunk and consumed in and upon his house and premises, situate at" &c., "under the provisions of an Act of Parliament made" &c. (9 *G. 4. c. 61.*, "To regulate the granting of licenses to keepers of inns, ale houses, and victualling houses, in *England*"), "was, on the 7th day of *May*, at" &c., "guilty of an offence against the tenor of such license, that is to say: he, the said *Richard Ashton*, did then and there knowingly suffer a certain unlawful game, to wit the game of Dominoes, to be played in your (a) said house and premises, contrary to the said statute, and against the tenor of his (a) said license, whereby the said *Richard Ashton* hath for his

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(a) Sic.

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said offence forfeited a sum not exceeding 5*l.*, to be levied and applied as the said statute directs."

Whateley now shewed cause. The question is, whether upon this information it appears that *Ashton* was charged with having committed an offence against the tenor of his license, so as to give jurisdiction to the justices to enforce the penalty imposed by stat. 9 *G.* 4. c. 61. s. 21. (a). The license, which, by sect. 13, must be in the form given in schedule C., makes it a provision that the party licensed "do not knowingly suffer any unlawful games or any gaming whatsoever therein." At common law no game was unlawful. Stat. 33 *H.* 8. c. 9. s. 11. enacts that no one "shall for his or their gain, lucre or living, keep, have, hold, occupy, exercise or maintain, any common house, alley or place of bowling, coyting, cloysh-cayls, half-bowl, tennis, dicing-table or carding, or any other manner of game prohibited by any estatute heretofore made, or any unlawful new game now invented or made, or any other new unlawful game hereafter to be invented, found, had or made." Sect. 16 enacts that no artificer, &c. shall "play at the tables, tennis, dice, cards, bowls, clash, coyting, logating, or any other unlawful game, out of Christmas." Stat. 30 *G.* 2. c. 24. s. 14. imposes a penalty upon any person or persons licenced to sell, or selling, liquors in his, her or their house or houses, who "shall knowingly suffer any gaming with cards, dice, draughts, shuffle boards, mississippi or billiard tables, skittles, nine pins, or with any other implement of gaming, in his, her or their houses," by journeymen, &c.

(a) Sect. 34 enacts that no conviction under the act shall be removed by certiorari.

Then stat. 8 & 9 *Vict. c. 109. s. 1.* repeals so much of stat. 33 *H. 8. c. 9.*, "whereby any game of mere skill, such as bowling, coytng, cloyshcayls, half bowl, tennis, or the like, is declared an unlawful game, or which enacts any penalty for playing at any such game of skill as aforesaid." The difficulty is to discover what it is that the Legislature meant to leave unlawful: nothing is taken out of the effect of stat. 33 *H. 8. c. 9.* except games of skill. Stat. 30 *G. 2. c. 24.* is not mentioned. It should rather seem that all games into which chance enters are still unlawful. That will comprehend the game of Dominoes: if the Court will not take judicial notice of the nature of this game, it becomes a question of fact for the justices; and they had jurisdiction on this charge. The game must fall at least within the words of the license, "any gaming whatsoever."

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Archbold, contra, was stopped by the Court.

LORD CAMPBELL C. J. It seems to me that this conviction was bad. Mr. *Whateley* cannot shew that the game of Dominoes is necessarily in itself unlawful: he therefore says that the words of the license, "any gaming whatsoever," are satisfied by proof of a game at Dominoes. But parties may play at a game, which is not in itself unlawful, without gaming. An opposite construction would make all classes of the community gamblers. The object of the statute was to prevent the contracting of bad habits by the practice of games, where money was staked, in public houses: if money were staked, that would be gaming; and then there might be a lawful conviction for allowing gaming in the house: but here the information does not charge the allowing gaming: it

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1852. charges only the allowing a certain unlawful game, to
The QUREN wit the game of Dominoes, to be played. But that is
v. not an unlawful game in itself.
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COLERIDGE, WIGHTMAN and ERLE Js. concurred.

Rule absolute.

END OF MICHAELMAS TERM.

The Court did not sit in banc in the Vacation after
Michaelmas Term.

CASES

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ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

HILARY TERM,

XVI. VICTORIA.

The Judges who usually sat in Banc in this Term were:

Lord CAMPBELL C. J.

COLERIDGE J.

WIGHTMAN J.

CROMPTON J.

MEMORANDA.

In last Vacation, The Right Honourable EDWARD BURTENSHAW, Lord St. LEONARDS, resigned the Great Seal, which Her Majesty was graciously pleased to deliver, in the same vacation, to the Right Honourable ROBERT MONSEY, Lord CRANWORTH, one of the Lords Justices of Appeal.

Lord CRANWORTH was succeeded in the office of Lord Justice of Appeal by the Right Honourable Sir GEORGE

1853. **JAMES TURNER**, Knight, one of the Vice Chancellors of England.

Sir G. J. TURNER was succeeded in the office of Vice Chancellor by Sir WILLIAM PAGE WOOD, Knight, one of Her Majesty's counsel.

Sir FREDERIC THESIGER, Knight, resigned the office of Attorney General, and was succeeded by Sir ALEXANDER JAMES EDMUND COCKBURN, Knight, one of Her Majesty's counsel.

Sir FITZROY KELLY, Knight, resigned the office of Solicitor General, and was succeeded by RICHARD BETHELL, Esquire, one of Her Majesty's counsel.

*Tuesday,
January 11th.*

Lord CAMPBELL C. J., at the Sittings of the Court on the first day of this term, announced that the Judges of the Courts of Common Law had unanimously agreed upon a series of Rules of Practice, which were to be considered as having been read in Court, and which were to take effect from this time (a).

(a) The Rules will be found in the Appendix to this volume, I. p. i.

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The QUEEN *against* The BIRMINGHAM and OXFORD Junction Railway Company and The BIRMINGHAM, WOLVERHAMPTON and DUDLEY Railway Company.

Tuesday,
January 11th.

PHIPSON moved for a rule to shew cause why the service of a copy of the writ of mandamus herein, dated 25th *November* 1852, should not be set aside for irregularity, and why in the mean time proceedings should not be stayed.

The Court will not set aside service of a copy of a writ of mandamus on the ground that the original writ was not served, nor shewn to the party on whom the copy was served.

It appeared, upon affidavit, that the two Companies were distinct and separate, and were incorporate, and subject to The Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c. 16.*). The mandamus purported to be directed to each Company. Facts were stated to shew that the original writ had never been served, and that it had not come to the knowledge of any clerk or officer of either of the Companies (a).

Phipson, in support of the application. The original writ should have been served, or at least shewn at the time of the service of the copy. The party served has a right to "reasonable proof that he is served with a correct copy of the process;" *Thomas v. Pearce* (b). [Lord *Campbell* C. J. That was not a case of a mandamus: is the rule general as to all documents?] On

(a) The circumstances of the service of the copy were not deposed to.

(b) 2 B. & C. 761.

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principle it should be so as to all process (a). The defendants cannot return a copy; nor can they move to quash the writ without knowing exactly what it is. [Lord Campbell C. J. As against the prosecutors, we should presume the copy to be correct.] In *Corner's Practice on the Crown Side*, &c., p. 227, it is said: "If the writ is directed to one person only, the original must be personally served upon such person; but if the writ is directed to several persons, a copy must be first served on all but one, shewing the original to each at the time of service, and the original delivered to such one." [Wightman J. The difficulty, if it is one, as to returning a copy seems not to be obviated by that proceeding. Lord Campbell C. J. If you dispute the correctness of the copy, you can, at your peril, abstain from returning it. Crompton J. Why should you set aside the service, if you are not served? Coleridge J. Take care how you neglect to return: Mr. Corner, of the Crown Office, tells us that returns are frequently made on copies.]

PER CURIAM (b),

Rule refused.

(a) See *Reg. Gen. HL. T. 16 Vict. s. 163*. Post, Appendix, I. p. xxvi.

(b) Lord Campbell C. J., Coleridge, Wightman and Crompton Js.

The Mayor, Aldermen and Burgesses of the
Borough of BERWICK UPON TWEED *against*
JAMES JEFFREYS OSWALD.

The SAME *against* WILLIAM MURRAY DOBIE and
JMEAS LESLIE CARSTAIRS, Executors of WIL-
LIAM MURRAY.

The SAME *against* JOHN CAMPBELL RENTON.

THE Mayor, &c. of Berwick v. Oswald was an action of covenant, upon a deed poll. The deed was set out in the declaration. It bore date 15th January 1842. The material parts were as follows. "We, David Murray, of the county of the borough and town of Berwick upon Tweed, John Campbell Renton, of" &c., "James Jeffreys Oswald, of" &c., "William Murray, of" &c., "and John Johnston, of" &c., considering that at special meetings of the council of the said county of

Covenant by the Mayor &c. of the borough of B., on a deed, executed after stat. 5 & 6 Wm. 4. c. 76. and before stat. 6 & 7 Vict. c. 89., by which, after reciting that the council of the borough had elected D. treasurer of the borough, defendant became surety to the

Corporation for D.'s accounting to them "during the whole time of D. continuing in the said office, in consequence of the said election, or under any annual or other future election of the said council to the said office." Averments that, by subsequent elections, D. was continued in his office, and did not account. Breaches: non-payment by defendant.

Plea 6. That D. was elected to the office, and the deed given, whilst the office was annual under stat. 5 & 6 Wm. 4. c. 76., that, on 9th November 1843, D. was, in obedience to stat. 6 & 7 Vict. c. 89. s. 6., elected to the office during pleasure: and that he accounted up to 9th November 1843. On demurrer, Held: that, the functions and duties of the office not being changed, it continued the same office, and the change in its tenure did not discharge defendant.

Plea 7. That, before breach, plaintiffs accepted a fresh surety bond in discharge of the deed sued on. On demurrer, Held bad, as pleading accord and satisfaction to a deed before breach.

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the borough and town of *Berwick upon Tweed*, held within the council chamber on" 27th *December* 1841, and on 11th *January* 1842, "for the purpose, amongst other things, of electing a treasurer, it was agreed that the salary of the future treasurer should be 60*l.* per annum, to be paid out of the Corporation's fund, and 10*l.* per annum to be paid out of the borough rate; and all perquisites and allowances, including those for collecting borough mail rents, water, sprig and acreage moneys, should cease: and that the treasurer should find sureties to the council in the sum of 2000*l.*: and that, at every quarterly and adjourned meeting of the council, and also at any special meeting, if then required to do so, the treasurer should present a correct account of the cash in his possession: and, lastly, that the treasurer should be appointed for the remainder of the year ending the 9th day of *November* next, if it should so long please the council, but not otherwise: And considering that, at such meetings of the council as aforesaid, they nominated and elected me, the said *D. Murray*, to be their treasurer upon the conditions aforesaid: And seeing that it was agreed that I, the said *D. Murray*, should find security or caution for the payment of all such sums of money as I might receive in consequence of my said appointment as treasurer aforesaid: Therefore the condition of this obligation is such, that I, the said *D. Murray*, and we, the said *J. C. Renton, J. J. Oswald, W. Murray* and *J. Johnstone*, as cautioners, sureties and full debtors, with and for the said *D. Murray*, hereby become firmly bound and obliged, as we do hereby bind and oblige ourselves, our and each and every of our heirs, executors, successors and administrators whomsoever, jointly and severally, well and

truly to pay unto *The Mayor, Aldermen and Burgesses of Berwick* aforesaid, or to their successors in office, all such rents, sum and sums of money, principal, interest and penalties, and other moneys whatsoever, as I the said *D. Murray* shall or may recover or receive, in virtue of my said appointment as treasurer as aforesaid, during the whole time of my continuing in the said office, in consequence of the said election, or under any annual or other future election of the said council to the said office: I the said *D. Murray* shall and will duly execute my said office, and be bould and faithful therein, and that I shall carefully attend to my duties as treasurer aforesaid during my continuance in office, and do every thing relating thereto to the best of my knowledge and skill, and shall and will truly and faithfully account to the said *Mayor, Aldermen and Burgesses of Berwick* aforesaid for all matters committed to my charge, and also for all rents, and sum and sums of money, with which I shall from time to time be intrusted in the manner above specified: And whatever loss, damage or expense shall be sustained or incurred through the negligence, fraud, default or intromissions of me, the said *D. Murray*, we, the said *D. Murray, J. C. Renton, J. J. Oswald, W. Murray* and *J. Johnston*, under the declaration after mentioned, hereby finally bind and oblige ourselves and our foressaids jointly and severally as said is, to content and pay the same to the said *Mayor, Aldermen and Burgesses of Berwick upon Tweed.*" The deed then contained a declaration limiting the responsibility of the sureties to 2000*l.* each. It concluded in the usual form of a Scotch instrument, in terms which did not qualify the meaning of the parts above set out. It was sealed and delivered as an English deed. The declaration then contained aver-

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ments: That *James Jeffreys Oswald*, in the deed mentioned, was the defendant; That *David Murray* became treasurer, by virtue of the election in the deed mentioned, and, by virtue of an election on the 9th *November* 1842, and of other subsequent elections by the council, continued treasurer until 24th *June* A. D. 1848. That, after the execution of the deed, and whilst he so was and continued treasurer, he received, by virtue of his office, money to a large amount, which he had not paid to the plaintiffs. First Breach: Non-payment by the defendant of the 2000*l*. The declaration further averred that *David Murray*, though requested, would not account; whereby the plaintiffs sustained a loss exceeding 2000*l*. Second Breach: Non-payment by the defendant of the 2000*l*.

Plea 6. That the said nomination and election of the said *David Murray* to be treasurer, in the said deed poll or writing obligatory mentioned and recited, and also the election of the said *D. Murray* to be such treasurer under and by virtue of the said election by the said council at the meeting of the said council holden on 9th *November* 1842, as in the said declaration mentioned, were made under and in pursuance of an Act" &c. (5 & 6 *Wm.* 4. c. 76.); and that, on the 9th *November* 1843, "the said *D. Murray* ceased to be such treasurer as aforesaid under or by virtue of the said elections, or either of them. And the defendant further says that, after the making and passing of an Act" &c. (6 & 7 *Vict.* c. 89.), to wit on 9th *November* 1843, "at a meeting of the council of the said borough, then holden, the said *D. Murray* was, in pursuance of the said statute" (6 & 7 *Vict.* c. 89.), "elected by the said council to be the treasurer of the said council, to hold

the said office of treasurer during the pleasure of the said council; the said election in this last plea mentioned being the same election of the said *D. Murray* as in the declaration is alleged to have been made at the meeting of the said council holden on the said 9th *November* 1843. "And the defendant says that, save by virtue and in pursuance of the said election in this plea last mentioned, the said *D. Murray*, after the day and year last mentioned, was" [not] "such treasurer as in the declaration mentioned, and never held the office of treasurer of the said borough. And the defendant further says that the said *D. Murray*, long before the commencement of this suit, to wit on" &c., "accounted for and paid to the plaintiffs all the moneys by him as such treasurer, as in the declaration mentioned, and by virtue of his said office of treasurer of the said borough, recovered or received, before the said 9th day of *November* 1843, or whilst he was such treasurer as aforesaid, under and by virtue of the said election in this plea first and secondly assigned; and that the whole of the money, for the non-payment of and non-accounting for which this action was brought and is now attempted to be maintained, was recovered and received by the said *D. Murray* after the said 9th day of *November* 1843, and after the said election of the said *D. Murray*, in pursuance of the said statute" (6 & 7 *Vict. c. 89.*), "as in this plea aforesaid." Verification.

Plea 7. That, after the making of the deed poll or writing obligatory in the declaration, and after the death of the said *John Johnston* therein named, and during the lifetime of the said *William Murray*, and before the committing of any of the breaches of covenant in the declaration mentioned and complained of,

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to wit on &c., "the said *D. Murray*, the said *W. Murray* and the said *J. C. Renton* made and sealed, and delivered as their deed to the said *Mayor, Aldermen and Burgesses of the said Borough of Berwick upon Tweed*, and the said *Mayor, Aldermen and Burgesses* then accepted and received from the said *D. Murray, W. Murray* and *J. C. Renton*, a certain other writing obligatory hereinafter mentioned, of great value, to wit of the value of 2000*l.*, in full satisfaction and discharge of the deed poll or writing obligatory in the declaration mentioned, and of all covenants, clauses and things therein contained; which said other writing obligatory, so delivered and received in satisfaction as aforesaid, was and is to the tenor and effect following; that is to say:" the plea then set out a deed executed by these parties, in nearly the same terms as the deed on which the action was brought, not referring to the former deed. Verification.

Demurrer to each plea, assigning causes which it is unnecessary to mention. Joinder.

The Mayor, &c. of Berwick v. Dobie was an action on the same deed, against the representative of *William Murray*.

The Mayor, &c. of Berwick v. Renton was also an action on the same deed.

The pleadings in the two actions last mentioned were the same as those in *The Mayor, &c. of Berwick v. Oswald*.

It was arranged that *Manisty* should be heard in support of the demurrers in all three cases, that *Hugh Hill* for the defendant in *The Mayor, &c. of Berwick v. Oswald*, and *W. H. Watson* for the defendants in the other two actions, should be heard; and that *Manisty* should make one reply in all three cases.

Manisty, for the plaintiffs. Stat. 5 & 6 Wm. 4. c. 76. s. 58. enacts that "the council of every borough, on the 9th day of *November*, in this present year, shall appoint a fit person, not being a member of the Council, to be the town clerk of such borough, who shall hold his office during pleasure;" "and the council of every borough shall in every year appoint another fit person, not being a member of the council, to be the treasurer of the borough, and also such other officers as have been usually appointed in such borough, or as they shall think necessary for enabling them to carry into execution the various powers and duties vested in them by virtue of this Act, and may from time to time discontinue the appointment of such officers as shall appear to them not necessary to be reappointed; and shall take such security for the due execution of his office by any such town clerk, treasurer, or other officer, as the said Council shall think proper; and shall order to be paid to the mayor, and to the town clerk and treasurer, and to every such other officer to be employed as aforesaid, such salary or allowance as the said council shall think reasonable; and in case of a vacancy in any such office as aforesaid by death, resignation, removal, or otherwise, the council of such borough may appoint another fit person in the place of the person so making such vacancy; provided that the town clerk and treasurer shall not be the same person." That was the enactment in force at the time when the deed was executed. The parties to the deed contemplated that *David Murray*, who had been elected treasurer for the year ending 9th *November* 1842, would probably continue treasurer for an indefinite time; but, as in form a fresh election would take place each year, the sureties expressly made themselves liable "during the whole time

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of my" *D. Murray's* "continuing in the said office, in consequence of the said election," that is, the election for the year 1842, "or under any annual or other future election of the said council to the said office." Then stat. 6 & 7 *Vict. c. 89.* received the Royal Assent on 24th *August* 1843. That Act, by sect. 6, enacted that, "whereas the office of treasurer of and for the aforesaid boroughs is an office of great trust, and an annual appointment to such office is inconvenient and unnecessary; be it therefore enacted, that so much of the said here-inbefore first recited Act," 5 & 6 *Wm. 4. c. 76.*, "as provides that the council in every borough shall in every year appoint a fit person to be treasurer of such borough shall be and the same is hereby repealed, and that the council of every borough shall, on the 9th day of *November* next after the passing of this Act, or on the 9th day of *November* next after such borough shall be incorporated, appoint a fit person, not being a member of the council, to be the treasurer of such borough, who shall thenceforth hold his office during the pleasure of the council for the time being; and on the happening of any vacancy thereafter, by death, resignation, amotion, or otherwise, the council shall proceed to the appointment of a successor, either at any of the general quarterly meetings of the council, or at a special meeting to be convened for that purpose, so that in no case such appointment be delayed beyond twenty one days from the happening of the vacancy." Accordingly, on 9th *November* 1843, the council, in obedience to this section, elected *David Murray* to the office of treasurer, to hold it at pleasure. The sixth plea relies on this. The question raised by that plea is, whether, giving a fair construction to the whole deed, it can be said that *David Murray*

continued in the office "under any annual or other future election." The election, after stat. 6 & 7 *Vict. c.* 89., to hold the office at pleasure, was probably not an annual election; but it seems very difficult to contend that it was not some "other" election.

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Plea 7 is a plea of the discharge by parol of a covenant before breach, which is a bad plea; *Kaye v. Waghorn*(a). When a covenant has been broken, and the covenantee's right has become a right of action to recover damages, accord and satisfaction in respect of those damages is a good plea. It is then not material that the vested cause of action is for a breach of an engagement under seal. But, whilst the covenant is unbroken, the covenantee's right is not a mere right to recover damages, but depends on an engagement under seal, which can be discharged only by an instrument of as high a nature as that by which it was formed. *Snow v. Franklin*(b), *Blake's Case*(c), *Alden v. Blague*(d), *Neale v. Sheffield*(e), illustrate this distinction. There is another objection to the plea. Even if the contract on which the action is brought had been a parol contract, the Corporation could not have accepted any thing in satisfaction of it except by deed sealed with their seal.

Hugh Hill, contra, for *Oswald*. The declaration is bad. The deed was intended to be made as a security in furtherance of stat. 5 & 6 *Wm. 4. c.* 76.; and it is not averred that the council thought this a proper security. [*Wightman J.* Might not the Corporation have taken a security though the statute had been silent on the sub-

(a) 1 *Taunt.* 428.(b) 1 *Lutw.* 358.(c) 6 *Rep.* 43 b.(d) *Cro. Jac.* 99.(e) *Cro. Jac.* 254.

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ject? I see no words in the statute prohibiting them from doing so. It enacts that they shall take such security as the council shall think proper: but it does not enact that all other securities shall be void.] It must be admitted that there are no express negative words in the statute.

The sixth plea is good. It distinctly negatives any misconduct on the part of *David Murray* up to the 9th November 1843: and the question comes to be, whether the sureties are liable for his misconduct after this date. The leading case on the subject is *Lord Arlington v. Merriche* (a). The recital in a surety bond is to be looked to, as explanatory of the undertaking of the sureties; and they are not responsible for misconduct in any office, save that for which they have engaged themselves; *London Assurance Company v. Bold* (b), *Barker v. Parker* (c), *Liverpool Water-works Company v. Atkinson* (d). Any alteration, even though it makes the suretyship less onerous, discharges the sureties; *Whitcher v. Hall* (e). In the present case, the recital shews that the parties were contemplating future elections to an office under stat. 5 & 6 Wm. 4. c. 76.; that is to say, elections to an annual office. Elections under stat. 6 & 7 Vict. c. 89. must be elections to hold the office during pleasure, which is substantially different. [Lord Campbell C. J. If you can shew that the duties and nature of the office are changed since stat. 6 & 7 Vict. c. 89., no doubt the office is not the same office. But would a mere change in the tenure prevent it from being the same office within

(a) 2 Saund. 403. See *Mayor of Birmingham v. Wright*, 16 Q. B. 623; *Bamford v. Hes*, 3 Exch. 380.

(b) 6 Q. B. 514.

(d) 6 East, 507.

(c) 1 T. R. 287.

(e) 5 B. & C. 269.

the meaning of the contract? For it all comes to a question on the construction of the instrument]. The mere change in the tenure necessarily makes a material difference in the liability of the sureties. Whilst the office was annual, they might, during any year, give notice that the council, if they reelected *David Murray*, must look out for new sureties. Now the office is for an indefinite time; and sureties have no longer the power of withdrawing. [Erle J. That difference would be very material if it existed: but I do not see anything in the contract allowing the sureties to terminate their liability at any fresh election. The contract seems to be: "as long as the council choose to continue electing him, we will be his sureties."] A Court of Equity would relieve the sureties. [Lord Campbell C. J. However that may be, a court of law can look only to the contract.] At all events, the change in the tenure of the office affects the risk of the sureties. The person who holds an annual office should be required to account at the end of each year: he who holds an office at pleasure is to account at uncertain intervals: that varies the risk to the sureties. [Erle J. In a Scotch appeal, *Mactaggart v. Watson* (a), the House of Lords held that the neglect of the obligees to require the principal debtor to account did not afford any defence to the surety. Coleridge J. The same point is decided in *Collins v. Gwynne* (b). But is the obligation to account at all varied by stat. 6 & 7 Vict. c. 89.?] The obligation to account under stat. 5 & 6 Wm. 4. c. 76. s. 60. is to account within three months after the

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(a) 3 Cl. & Fin. 525.

(b) 9 Bing. 544, in Com. Pl. Judgment of Common Pleas affirmed in Exch. Ch.; *Gwynne v. Burnell*, 2 New Ca. 7. Judgment of Exch. reversed in Dom. Proc. (not on the point in the text, which arose on the 8th plea, as to which the three Courts agreed); *Gwynne v. Burnell*, 6 New Ca. 453; S. C. 7 Cl. & Fin. 572.

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expiration of the office. [*Coleridge J.* Only if required. The officer is to account at such times as the council shall direct during the continuance of his office or within three months after its expiration. It may be that the duty of the council is to call upon him to account; but that was also the case in *Collins v. Gwynne (a)*.]

Watson, for *Dobie* and *Carstairs*, and *Renton*. The change in the tenure of the office materially alters the inducement to the sureties to enter into the bond. A man may well agree to become surety when he knows that, if all proceeds regularly, the accounts will be taken annually, though he does not absolutely stipulate that they shall be so taken. [*Erle J.* I see the parties to the deed contemplate that the treasurer shall account once every quarter.] That is only as to the cash in his hands. The sureties are liable for every thing; and the Act would require him to account for every thing. If the office had been changed into an office during good behaviour, surely that would have discharged the sureties. It is like the fresh deputation in *Bartlett v. Attorney General (b)*.

The seventh plea is good, not as accord and satisfaction, but because the second deed was taken in substitution for the first. [*Lord Campbell C. J.* I can see no reason why the two deeds should not coexist.]

Manisty, in reply. The office remains the same office; *Augero v. Keen (c)*. [*Lord Campbell C. J.* No doubt, if the functions and duties are not altered, the office continues the same.]

Cur. adv. vult.

(a) 9 *Bing.* 544.

(b) *Parker*, 277.

(c) 1 *M. & W.* 390.

LORD CAMPBELL C. J., in this term, (*January 12th*), delivered the judgment of the Court.

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We begin with considering the validity of the 6th plea. It is quite clear that, according to *Lord Arlington v. Merricke* (a), and many subsequent cases, the liability of the sureties of *David Murray* would have ceased on the 9th day of *November 1842*, however long he might have been continued in the office of treasurer, if to the words "during the whole time of my continuing in the said office, in consequence of the said election," there had not been added the words "or under any annual or other future election of the said council to the said office." There appears to be no objection in point of law to the council taking prospectively a security for the good conduct of the treasurer, to remain in force while he should continue in the office of treasurer under any number of successive elections. The question therefore comes to this short point, whether, after the change in the tenure of the office made by stat. 6 & 7 *Vict. c. 89. s. 6.*, the office is or is not to be considered the same office as that to which he had been elected when the security was given. A mere change in the tenure of the office would not, we think, discharge the sureties; for such a change is contemplated by the instrument which they have executed. As the law stood in 1842, the office of treasurer was an annual office; and they have stipulated that their liability shall continue while *David Murray* continues in the office "under any annual or other future election of the said council to the said office." From being an annual office under stat. 5 & 6 *Wm. 4. c. 76. s. 58.*, it became,

(a) 2 *Saund.* 403.

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under stat. 6 & 7 *Vict. c. 89. s. 6.*, an office to be held during pleasure for an indefinite time; the council being thereby required to appoint a fit person to be treasurer "who shall thenceforth hold his office during the pleasure of the council for the time being." When *David Murray* was subsequently appointed under this statute, we think he must be considered as continuing in the office, although not under an annual yet under a future election to the office, within the meaning of the deed. The sureties seem to have contemplated the possibility of the Legislature changing the tenure of the office; and no objection existed in point of law to their stipulating for their continuing liability, notwithstanding such a change. If the nature and functions of the office had been altered by stat. 6 & 7 *Vict. c. 89.*, although its name remained the same, still it would not be the "said office" within the meaning of the deed. But we cannot find that any such alteration has been made. The duties of the office are defined by stat. 5 & 6 *Wm. 4. c. 76. ss. 59, 60, 93, 126.* Although none of these duties are expressly altered by stat. 6 & 7 *Vict. c. 89.*, it is contended that there is a consequential alteration in the duty of accounting, by reason of the treasurer now holding his office for an indefinite time. However, upon examining the manner in which he is directed to account under stat. 5 & 6 *Wm. 4. c. 76.*, when the office was annual, we think it may be and ought to be substantially and effectually followed when he holds for an indefinite time, so that the risk of the sureties is not increased by the alteration; and the office must be considered as remaining the same. We do not consider it necessary to refer more particularly to the numerous cases cited in argu-

ment upon this head, as the principles which they establish are not in dispute, and none of them assist in construing the Acts of Parliament upon which this case turns. On the demurrer to the 6th plea we give judgment for the plaintiffs.

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The defendant's counsel admits that the 7th plea cannot be supported as *accord and satisfaction*, being pleaded to the deed before breach; and the authorities are many and uniform to this effect. But, if not by way of *accord and satisfaction* as pleaded, how can the second deed be a bar to an action on the first? It contains nothing which can operate as a release of the first deed; and the two may stand together concurrently. We have no difficulty therefore in giving judgment for the plaintiffs on the demurrer to this plea.

The objection to the declaration, suggested on the ground that the security taken was not in conformity to the statute, was abandoned during the argument.

We have to give the like judgment in *The Mayor &c. of Berwick v. Dobie*, and *The Mayor &c. of Berwick v. Renton*, in which the plaintiffs sued on the same deed, and the pleadings were the same.

Judgment for plaintiffs.

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The QUEEN, on the prosecution of SIR JAMES BROOKE, *against* THE EASTERN ARCHIPELAGO COMPANY.

Scire facias to repeal a charter incorporating a trading company. The charter directed, amongst other things, that the Company should not begin business until it had been certified to the President of the Board of Trade, by at least three of the Directors, that, at least, one half of the capital had been subscribed for, and at least 50,000*l.* paid up. The

SCIRE FACIAS to repeal a charter under the Great Seal. The declaration set forth the writ, which recited the charter: the material parts were set forth as follows. "Whereas We," by letters patent, "reciting that, whereas it had been represented unto us that *John Melville*, of" &c., "*Philip Anstruther*, of" &c., "*Henry Wise*, of" &c., "and other persons had agreed to subscribe a capital of 200,000*l.*, to be divided into 2000 shares of 100*l.* each, and to form a company or copartnership to be called *The Eastern Archipelago Company*, for the purpose of purchasing" &c., "or otherwise dealing with and making a profit of, land" &c., "and of the produce thereof, in the island of *Labuan* and the lands

charter contained a proviso that, in case the Corporation should not comply with any "the directions and conditions in Our said letters patent contained," it should be lawful for the "Queen, by any writing under the great seal or under the sign manual," to revoke the charter, "either absolutely, or under such terms or conditions" as the Queen should think fit. The declaration in sci. fa., which was at the relation of a private prosecutor, contained, amongst others, a suggestion that, before the Company began business, a certificate was given by the Directors that 50,000*l.* had been paid up, which was false in fact, to their knowledge; and, this suggestion being traversed, the verdict was found for the Crown. On a rule to arrest the judgment, on the ground that the declaration did not shew that the Queen had, by writing under the great seal or sign manual, revoked the charter: Held by Lord Campbell C. J. and Wightman J. that the express power reserved by the charter, to revoke it wholly or in part, was in addition to and consistent with the implied right of the Crown to revoke it by sci. fa. on breach of a condition subsequent; that there was no distinction, in this respect, between a sci. fa. by a private prosecutor, in the name of and with the consent of the Crown, and one at the instance of the Crown; and that the declaration in sci. fa. was sufficient. Held by Coleridge J. and Erle J. that the express power to revoke superseded the implied power of revocation, and that it was necessary that there should be a revocation, by writing under the great seal or sign manual, for this condition broken, before any sci. fa. The Court being equally divided, the rule dropped.

adjacent, and of working therein all mines" &c., "and raising all coal" &c., "and of trading and trafficking therein and therewith, and also of trading and trafficking with any of the authorities or inhabitants of the said island and the lands adjacent" &c., "and for purchasing or hiring British and other ships for all or any of the purposes aforesaid; and that the said persons had humbly besought Us to grant to them Our royal charter: Therefore We, of Our especial grace, certain knowledge and mere motion, did, by our said letters patent, for Us, Our heirs and successors, give, grant and ordain that the said *J. Melville, P. Anstruther, H. Wise*, and all such other persons and bodies politic or corporate as had become, or from time to time thereafter might become, members of the said copartnership or company so agreed to be formed, and should hold shares therein of not less than 100*l* each, should be one body corporate and politic in name and deed, by the name of *The Eastern Archipelago Company*, for the purposes thereinbefore mentioned, and by that name should sue and be sued" &c., "and should have perpetual succession with a common seal which might be by them changed or varied at their pleasure, but subject to the directions and provisions in Our royal charter contained." The writ then recited provisions in the charter, giving power to Directors to act for the Company, and proceeded: "And We did thereby further declare that it should be lawful for the said Corporation, notwithstanding the statutes of mortmain or any other statutes or laws to the contrary, to purchase, take, hold and enjoy to them and their successors, as well in Great Britain as in our colonial possessions and other places beyond the seas, such houses, offices, buildings and other hereditaments as might be thought necessary or

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proper for the purpose of managing, conducting and carrying on the affairs, concerns and business of the said Company, but not for any other purposes; and to sell, convey and dispose of the same when not wanted for the purposes of the said business. Provided always that the yearly value of such houses, offices, buildings, lands or other hereditaments within Our said United Kingdom and Our colonial possessions, other than in the said island of *Labuan*, and lands adjacent, or either of them, when the said Corporation should enter into possession thereof, should not exceed in the whole the sum of 2,000*L*. And We did thereby grant unto all persons and bodies politic, who might be otherwise competent so to do, Our especial licence and authority to grant, sell, demise, assign, alien, and convey in mortmain, unto and to the use of the said Corporation and their successors, any such lands, tenements and hereditaments as afore-said accordingly; thereby nevertheless declaring that it should not be necessary for such persons or bodies, or any purchasers from the said Corporation, to enquire as to the amount of the income of the property which might have been previously acquired by the said Corporation. And We did further direct that the sum of 100,000*L*, at the least, being one half of the said afore-said capital of the said Corporation, should be subscribed for within twelve calendar months from the date of Our said letters patent, and that the sum of 50,000*L*, at the least, should be paid up within such period. And We did thereby direct that the said *J. Melville*, *P. Anstruther*, and *H. Wise*, and all other the members for the time being of the said Corporation, should, within one year from the date of our letters patent, enter into and execute a proper deed of copartnership and settlement,

whereby the capital of the said Company should be divided into the aforesaid number of shares, to be numbered in regular succession, beginning from one upwards, whereby all the members for the time being of the said Corporation should enter into proper covenants for the payment of such portion of the said capital as should remain unpaid for the time being, and as and when the same should be called for by the Directors having the management of the affairs of the said Corporation, and whereby provision should be made for the registration of the names of all the members of the Corporation from time to time in proper books to be provided for that purpose, and for the management of the affairs of the said Corporation by a court of Directors to be elected by the shareholders in general meeting assembled, and wherein should also be inserted all such other clauses and provisions as might be usual and expedient in like cases. And We did thereby further direct that in such deed should be contained a provision for the producing at the annual meetings of the Corporation a true and correct balance sheet such as is usual in mercantile accounts, with a provision for the dissolution of the said copartnership when and as it should appear that three fourths of the subscribed capital of the said Corporation should have been lost in the course of trade or otherwise, and for the winding up the affairs of the said partnership, and also for the furnishing annually to the President of the Board of Trade, or otherwise as might be directed, copies of such balance sheet, and also such other accounts as might be from time to time required by the President of the Board of Trade. And We did thereby further direct that such deed of settlement should be prepared to the satisfaction

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of the President for the time being of the Lords of the Committee of our Privy Council for the consideration of all matters of trade and plantations (commonly thereafter called the Board of Trade), and that a copy of such deed of settlement should within the aforesaid period of one year be lodged with the said Board of Trade, and that a certificate to that effect, to be endorsed on Our said Charter and on the said deed, under the hand of *John George Shaw Lefevre*, Esquire, one of the secretaries of the said Board of Trade, or other the person authorized in that behalf by the President of the said Board, should be considered evidence that the said deed of settlement had been duly prepared, and a copy thereof deposited, in accordance with Our directions in that behalf above contained; but such certificate should not be given until it should be made to appear that all the Directors for the time being, and at least two thirds of the members for the time being, of the Corporation had executed the same. And We did thereby further declare that the several regulations, to be contained in the said deed, or to be contained in any by-laws to be made in pursuance thereof, or in any supplemental deed to be made in pursuance of such first mentioned deed, should be taken to be the existing regulations of the said partnership, except as far as the same might be altered or varied, or might be repugnant to the provisions of Our said royal charter, or the laws of Our realm, or of any of Our colonial possessions. And We did thereby further direct that the said partnership should not begin business until it should have been certified to the President of the said Board of Trade, by at least three of the Directors of the said Company, that at least one half of the capital before mentioned had been subscribed for,

and the said sum of 50,000*L.*, at the least, paid up, such certificate of the said Directors to be indorsed on this Our said royal charter, and to be sufficient evidence for the purpose of the aforesaid provision in that behalf. And We did thereby further declare that it should be lawful for the said Corporation, by a resolution or resolutions of the shareholders, in general meeting assembled, according to the provisions to be in that behalf contained in such deed of settlement as aforesaid, either at one time or from time to time, to determine that the capital of the said Corporation should be increased to the sum of 400,000*L.*, or such further sum as might from time to time, but with the consent in writing of the President of the said Board of Trade, be determined on. And We did thereby further declare that it should be lawful for the said Corporation, by a resolution or resolutions of the shareholders, in general meeting assembled, according to the provisions in that behalf to be contained in such deed of settlement as aforesaid, either at one time, or from time to time, to determine to borrow any sum or sums of money not exceeding 10,000*L.*; and so as at no time should there be owing in respect of any such moneys so to be borrowed a sum exceeding the said sum of 10,000*L.* Provided always, and We did thereby will and declare, that, in case the said Corporation should fail to enter into and execute such deed of settlement as aforesaid, and to deposit a copy thereof within the period limited in that behalf, and subject as aforesaid; or in case the said Corporation should not comply with any other the directions and conditions in Our said letters patent contained; it should be lawful for Us, Our heirs and successors, by any writing under the great seal or under the sign manual of Us, Our heirs

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or successors, to revoke and make void Our said royal charter, and every clause, matter and thing therein contained, either absolutely, or under such terms and conditions as We or they should think fit. Provided always that, notwithstanding anything therein contained, it should be lawful for Us, Our heirs and successors, either under the great seal or by writing under the sign manual of Us, Our heirs or successors, at any period after the expiration of twenty one years from the date of Our said letters patent, to revoke and make void Our said royal charter, and every clause, matter and thing contained therein, or to add such modifications, conditions or provisions thereto as We, Our heirs or successors, should think fit. And We did thereby declare that, when the said Corporation should have been dissolved in pursuance of the provisions of the said deed, or of any supplemental deed, and the affairs of the said partnership should have been completely wound up, and its debts and obligations fully discharged, Our said royal charter should be absolutely void. And We did thereby direct that the aforesaid deed, so directed to be prepared, should, within one year from the date thereof, be enrolled in Our High Court of Chancery, and that any supplemental deed should be enrolled in like manner within six calendar months from the date thereof, and any by-laws to be made by the said copartnership should be, from time to time, enrolled in like manner, within six calendar months from the making thereof respectively, and so as such by-laws should in no case be contrary to the provisions of Our said royal charter, or of such deed, or of any supplemental deed as aforesaid. And We, for Ourselves, Our heirs and successors, did grant and declare that Our said letters patent, or the en-

rolment thereof, should be in all things valid and effectual in the law" &c. "Provided always, and We did thereby direct and declare, that Our said royal charter was granted upon the express condition that the said partnership thereby incorporated should, at all times during the continuance of the said Corporation, abide by and conform to all and every of the directions which might be given to the said Corporation by any one of the principal secretaries of state of Us, Our heirs or successors, as regards the intercourse and dealings by the said Company with any foreign state or power. And, lastly, We did thereby require and enjoin all Governors" &c. "in Our colonial possessions or elsewhere, whom it might concern, to give full force and effect to Our said letters patent, and to be in all things aiding and abetting to the said Company and their successors. As by the said letters patent enrolled in Our said Chancery (amongst other things) will more fully and at large appear." The writ then contained suggestions by Sir *James Brooke*, who prosecuted in that behalf, "that the said *J. Melville*, *P. Anstruther*, *H. Wise* and other persons had not agreed to subscribe a capital of 200,000*L.*, to be divided into shares, and to form a company or partnership, as had been falsely represented unto Us; and also that the said *J. Melville* had not agreed with any other persons to subscribe any portion of the said capital, or to form the said company or copartnership, as had been falsely represented to Us; and also that the said *P. Anstruther* had not agreed with any other person to subscribe any portion of the said capital, or to form the said company or copartnership, as had been falsely represented to Us; and also that the sum of 100,000*L.*, at the least, being one half of the said capital of the said Corporation,

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had not been subscribed for within twelve calendar months from the date of Our said letters patent; and also that the sum of 50,000*l.*, at least, of the said capital of the said Corporation had not been paid up within the said period of twelve calendar months from the date of Our said letters patent; and also that the said *J. Melville*, *P. Anstruther*, *H. Wise*, and all other the members for the then time being of the said Corporation, did not, within one year from the date of Our said letters patent, enter into and execute a proper deed of copartnership and settlement, pursuant to the conditions in Our said letters patent in that behalf contained, and containing therein the covenants and provisions in Our said letters patent in that behalf required; and also that the said *J. Melville* did not, within one year from the date of Our said letters patent, or at any time since, enter into and execute any deed of copartnership and settlement, pursuant to the provisions in Our said letters patent in that behalf contained; and also that the said *P. Anstruther* did not, within one year from the date of Our said letters patent, or at any time since, enter into and execute any deed of copartnership and settlement, pursuant to the provisions in Our said letters patent in that behalf contained; and also that a copy of such deed of settlement, as in the said letters patent mentioned, was not within the said period of one year from the date of Our said letters patent lodged with the said Board of Trade; and also that, although the said partnership began business on a certain day, to wit" &c., "yet, at the time when the said partnership so began business, 50,000*l.* of the capital of the said partnership had not been paid up; and also that, although the said partnership began business on a certain day, to wit on" &c., "yet, at the time when the

said partnership so began business, one half of the capital of the said partnership had not been subscribed for; and also, although the said partnership began business on a certain day, to wit on" &c., "yet, at the said time when the said partnership so began business, it had not been certified to the President of the Board of Trade, in the said letters patent mentioned, by at least three of the Directors of the said Company, pursuant to the provisions of the said letters patent, that at least one half of their capital had been subscribed for, and the said sum of 50,000*L.*, at the least, paid up; and also that, although the said partnership began business on a certain day, to wit on" &c., "and although, at the time when the said partnership so began business, one half of the capital of the said Company had not been subscribed for, nor had the sum of 50,000*L.*, at the least, of the said capital been paid up, yet it had been certified to the President of the said Board of Trade by the Directors of the said Company, falsely and untruly, that at least one half of the capital of the said Company had been subscribed for, and the said sum of 50,000*L.*, at the least, paid up, in violation of the provisions in the said letters patent in that behalf contained: whereas, in truth and in fact, at the time of the giving of such last mentioned certificate, one half of the said capital of the said company had not been subscribed for, nor had the said sum of 50,000*L.*, at least, of the said capital been paid up, as the said Directors then well knew." The writ then commanded notice to be given to *The Eastern Archipelago Company* to appear in Chancery, to say "why the said letters patent, so as aforesaid granted to the said *Eastern Archipelago Company*, and the enrolment of the same, for the reasons aforesaid, ought not to be can-

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celled, vacated and disallowed, and those letters patent restored unto Our said Chancery, there to be cancelled, and further do and receive those things which Our said Chancery shall consider in this behalf."

Plea 1. A traverse of the suggestion that the said *J. Melville, P. Anstruther, H. Wise* and other persons had not agreed to subscribe a capital of 200,000*L.*, to be divided into shares, and to form a company or partnership, as had been represented to Her Majesty as in the said writ mentioned: conclusion to the country. Issue thereon.

Plea 2. A traverse of the suggestion that the said *J. Melville* had not agreed with any other person to subscribe any portion of the said capital, or to form the said company, or copartnership, as had been represented to Her Majesty as in the said writ mentioned: conclusion to the country. Issue thereon.

Plea 3. A traverse of the suggestion that the said *P. Anstruther* had not agreed with any other person to subscribe any portion of the said capital, or to form the said company or copartnership, as had been represented to Her Majesty as in the said writ mentioned: conclusion to the country. Issue thereon.

Plea 4. A traverse of the suggestion that the sum of 100,000*L.*, at the least, being one half of the said capital of the said Corporation, had not been subscribed for within twelve calendar months from the date of Her Majesty's said letters patent: conclusion to the country. Issue thereon.

Plea 5. A traverse of the suggestion that the sum of 50,000*L.*, at the least, of the said capital of the said Corporation had not been paid up within the said period of twelve calendar months from the date of Her Majesty's said letters patent: conclusion to the country. Issue thereon.

Plea 6. To the suggestion that the said *J. Melville, P. Anstruther, H. Wise*, and all others the

members for the then time being of the said Corporation, did not, within one year from the date of Her Majesty's said letters patent, enter into and execute a proper deed of copartnership and settlement, pursuant to the conditions in Her Majesty's letters patent in that behalf contained, and containing therein the covenants and provisions in Her Majesty's said letters patent in that behalf required: "That, before such deed of copartnership and settlement, as in the said letters patent required, had been entered into and executed by the members for the time being of the said Corporation, and before the end of one year from the date of the said letters patent, to wit on" &c., "the said *J. Melville* and the said *P. Anstruther*, respectively, ceased to be members of the said Corporation, and have not, nor hath either of them, from thence hitherto been members or a member of the said Corporation," and, "that the said *H. Wise*, and all other the members for the then time being of the said Corporation, did, within one year from the date of Her Majesty's said letters patent, to wit on" &c., "enter into and execute a proper deed of copartnership and settlement," &c.: verification. The Replication to this plea traversed the averment that a proper deed of settlement was in due time executed by *Henry Wise* and all the other the members of the Corporation: conclusion to the country. Issue thereon. Plea 7. As to the suggestion that the said *J. Melville* did not, within one year from the date of Her Majesty's said letters patent, or at any time since, enter into and execute any deed of copartnership and settlement, pursuant to the provisions in Her Majesty's letters patent in that behalf contained: "That, before such deed of copartnership" &c. "was entered into and executed by the members for the time being of the said Corpora-

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tion, and before the end of one year from the date of the said letters patent, to wit on" &c.; the said *J. Melville* ceased to be, and from thence hitherto hath not been, a member of the said Corporation: verification. Replication, traversing the averment that *J. Melville* had ceased to be a member of the Corporation: conclusion to the country. Issue thereon. Plea 8. To the suggestion that the said *P. Anstruther* did not, within one year from the date of Her Majesty's said letters patent, or at any time since, enter into and execute any deed of co-partnership and settlement, pursuant to the provisions in Her Majesty's letters patent in that behalf contained: That, before such deed of copartnership &c. was entered into and executed by the members for the time being of the said copartnership, and before the end of one year from the date of the said letters patent, to wit on &c. the said *P. Anstruther* ceased to be, and from thence hitherto hath not been, a member of the said Corporation: verification. Replication, traversing the averment that *P. Anstruther* had ceased to be a member of the Corporation: conclusion to the country. Issue thereon. Plea 9. A traverse of the suggestion that a copy of such deed of settlement, as in the said letters patent mentioned, was not within the said period of one year from the date of Her Majesty's letters patent lodged with the said Board of Trade: conclusion to the country. Issue thereon. Plea 10. A traverse of the suggestion that, at the time the said partnership so began business, 50,000*l.* of the capital of the said partnership had not been paid up: conclusion to the country. Issue thereon. Plea 11. A traverse of the suggestion that, at the time when the said partnership so began business, one half at least of the capital of the said partnership had not been sub-

scribed for: conclusion to the country. Issue thereon.

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Plea 12. A traverse of the suggestion that, at the time when the said Company so began business as in the said writ alleged, it had not been certified to the President of the Board of Trade, in the said letters patent mentioned, by at least three of the Directors of the said Company, pursuant to the provisions of the said letters patent, that at least one half of their capital had been subscribed for, and the sum of 50,000*l.*, at the least, paid up: conclusion to the country. Issue thereon. Plea

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13. As to the last suggestion in the said writ contained: That, at the time of the giving of the said certificate, one half of the said capital of the said Company had been subscribed for, and the sum of 50,000*l.* had been paid up, pursuant to the provisions of the said letters patent in that behalf: conclusion to the country. Issue thereon.

On the trial, before Lord *Campbell* C. J., at the *Middlesex* Sittings after last *Trinity* term, the verdict passed for the prosecutor on the 5th, 10th and 13th issues, and for the defendants on the others.

Crowder, in last *Michaelmas* term, obtained a rule nisi to arrest the judgment. In the same term (a), Sir *F. Thesiger*, Attorney General, Sir *F. Kelly*, Solicitor General, *Hugh Hill* and *Willes* shewed cause; and *Crowder*, *W. H. Watson* and *Montagu Smith* were heard in support of the rule. The arguments and points are so fully discussed in the separate judgments of the Judges as to render any further statement unnecessary.

Cur. adv. vult.

(a) November 15, 17. Before Lord *Campbell* C. J., *Coleridge*, *Wightman* and *Erie* Js.

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There being a difference of opinion on the Bench, the Judges, in this term (*January 28th*), delivered their opinions separately.

ERLE J. In this case, the prosecutor contends that the letters patent granted to the defendants have become void, because the direction contained therein, that the Company should not begin business until it had been certified by three of the Directors that half of the capital had been subscribed for, and 50,000*l.* paid up, had not been properly complied with; the jury having found that the 50,000*l.* had not been paid up, although the certificate had been given, and the Company had begun business. The letters patent incorporate the Company, and declare that certain powers are vested in it, and direct, *inter alia*, that the Company shall not begin business until it shall have been certified by three of the Directors that 50,000*l.* had been paid up, and provide, in case the Corporation shall not comply with any of the directions and conditions therein contained, it shall be lawful for the Sovereign, by any writing under the great seal, or under the sign manual, to revoke and make void the said charter, either absolutely or under such terms and conditions as the Sovereign shall think fit. And it further provides that, after twenty one years, it shall be lawful for the Sovereign, under the great seal or by writing under the sign manual, to make void the charter, or to add such modifications, conditions and provisions thereto as the Sovereign shall think fit. And it further declares that, when the Corporation shall have been duly dissolved, and its affairs wound up, and its debts paid, the charter shall be absolutely void. Ac-

cording to the prosecutor's construction, the charter becomes void upon non-compliance with any of the directions contained therein, although it is not revoked by instrument under the great seal or sign manual. But this construction is contrary to the words of the charter; it assumes that which does not exist, namely, a condition to be absolutely void upon such non-compliance; it omits that which does exist, namely, the instrument under the great seal or sign manual as a condition of revocation. If effect is to be given to the words of the charter in their ordinary meaning, this construction seems to me untenable. The prosecutor also alleges that the legal effect of the provision is to make the charter revocable at the will of the Crown, upon such non-compliance, and that the permission of the Attorney General to the prosecutor to sue out the scire facias is conclusive to prove that the Crown has willed the revocation, and that the mention of the great seal and sign manual is without meaning. But this assertion is unsupported by authority, and contrary to principle. The consent of the Attorney General to the scire facias is no evidence of the will of the Crown to revoke, as revocation is no part of his duty: and, further, the will of the Crown to revoke is not sufficient unless expressed in the manner specified in the charter. If the question of the avoidance of the charter was raised in another legal proceeding, it would be necessary to prove the non-compliance with the direction, and the will of the Crown, to revoke, expressed as provided in the charter: and, if the permission of the Attorney General to *James Brooke* to prosecute this scire facias was offered to prove such will, I apprehend it would be no evidence to go to the jury to establish the fact. Further, as the issue would be the will to revoke,

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expressed under the great seal or sign manual, if the Attorney General as a witness stated that he, in his discretion, intended to revoke, or that the Lord Chancellor intended to put the great seal to a revocation, or was to offer a direct statement of the intention of the Sovereign to revoke, it seems to me that these facts also would be no evidence to go to the jury to prove revocation according to the charter: and, if so, neither is the Attorney General's consent to this scire facias of more avail in the present proceeding. The prosecutor further alleges that the scire facias is for the purpose of inquiring whether the direction has been complied with, and according to the result of the inquiry the Crown may revoke or not: but this seems a mistaken view of the judgment in scire facias; for, if upon this record he is entitled to judgment, we must adjudge that the letters patent be cancelled: the argument supposes that we may give a judgment in the nature of a certificate that the fact of such non-compliance was proved. If other parts of the charter are examined, they confirm the view taken by the defendants. In case of dissolution of the Company, provision is made for absolute avoidance of the charter, without reference to the will of the Crown; and by this it appears that a distinction between absolute avoidance and revocation by the Crown was known. Also, after the lapse of twenty one years provision is made for the Crown to revoke or modify as it shall will; but the will must be expressed by instrument authenticated in the same way as is required in case of such non-compliance as aforesaid; and it seems difficult to contend that if a scire facias was brought in the twenty-second year the Court would be bound to give judgment of cancellation; and yet the only objection would be the same as the

defendants now rely on; namely, that the revocation must be by an instrument according to the charter, and the scire facias is not such an instrument, nor equivalent thereto. The provisions enabling the Crown to declare a forfeiture of a charter are in analogy with provisions for forfeitures between subjects, and are to be construed by the same rules. If in an instrument between subjects the claim of forfeiture was upon condition of an instrument being executed in a specified manner, there would be no forfeiture without such an instrument. For these reasons I think the judgment should be arrested.

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WIGHTMAN J. An application was in this case made to the Court, to arrest the judgment upon a verdict which had been obtained for the Crown, in a proceeding by scire facias to repeal the letters patent of incorporation, which had been granted to the defendants, on the ground of substantial defects in the declaration in scire facias.

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It appeared, upon the argument, that the letters patent of incorporation, which conferred certain privileges upon the Company, contained clauses directing certain things to be done by them: and, amongst others, directing that the sum of 100,000*l.*, at the least, being one half of the capital of the said Corporation, should be subscribed for within twelve calendar months from the date of the letters patent, and that the sum of 50,000*l.*, at the least, should be paid up within such period. There was a further direction that the Company should not begin business until it had been certified to the President of the Board of Trade, by at least three of the Directors of the Company, that at least one half of their capital had been subscribed for, and the said sum of 50,000*l.*, at the

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least, paid up. The charter then contained a proviso that, in case the Corporation should not comply with any of the directions and conditions in the letters patent contained, it should be lawful for Her Majesty, "by any writing" under the great seal, or under Her sign manual, "to revoke and make void" that charter, "either absolutely, or under such terms and conditions as" She might think fit; and also a further proviso that Her Majesty might, either under the great seal or by sign manual, at any period after twenty one years from the date of the charter, revoke and make it void, or add such modifications, conditions or provisions as She might think fit. The declaration alleged non-compliance with several of the directions, including the direction that half the capital should be subscribed for and 50,000*l.* at least paid up within twelve calendar months from the date of the letters patent; and, upon issues taken upon such allegations, there was a verdict for the Crown.

Two objections were made to the declaration in *scire facias*. First, that the directions, the non-compliance with which was complained of, were not conditions which, if not complied with, would enable the Crown to revoke its grant; and, Secondly, that, if they were conditions the non-compliance with which might entitle the Crown to revoke its grant, the proceeding ought to be, according to the terms of the proviso, not by *scire facias* in the first instance, but by an absolute or qualified revocation under the great seal or sign manual, previous to any proceeding by *scire facias*; and that the declaration was bad for not alleging such preliminary revocation under the great seal or sign manual. With respect to the first of these objections, it appears to me that the directions in the charter are in effect conditions, and

that the charter is granted subject to compliance with them. I do not think it necessary to advert to the distinctions that are taken in many of the old authorities, in favour of the prerogative, between grants by the Crown and grants by a subject; or to the cases in which it has been held that words, which would not amount to a condition in a grant by a subject, will have that effect in a grant by the Crown. Without reference to such cases or distinctions, it appears to me that the directions in the charter, looking at the whole instrument, are intended to be, and in effect are, conditions. The grant is made by the charter "subject to the directions and provisions in Our royal charter contained;" and, unless the directions are conditions, there are none in the charter: but the first proviso, in terms, treats the directions as conditions. It provides that, in case the Corporation shall not comply with any of "the directions and conditions" in the letters patent, the Crown may by any writing under the great seal or the sign manual revoke them. As there are no conditions in the charter, unless the directions are such, the word "conditions" would have no meaning in the proviso unless so understood. The second ground of objection however was that which was most strongly urged on the part of the Corporation. The declaration states that Sir *James Brooke* is the prosecutor of the scire facias: and it was contended that a prosecution at his instance was inconsistent with the power which the Crown reserved to itself by the proviso: for that, if the prosecutor is entitled to judgment, it must be absolute for a repeal of the letters patent: whereas, by the proviso, the Crown reserves to itself the right, in case of non-compliance with the directions, of repealing the charter either abso-

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lutely or under terms and conditions. It was contended that the Crown itself could not, in the first instance, proceed by scire facias to repeal the letters patent, upon a suggestion of non-compliance with some of the conditions, but that there must be a previous revocation or repeal, absolute or qualified, by writing under the great seal or sign manual; and that then a scire facias might issue to inquire into the truth of the matters suggested as a ground for the repeal of the letters patent: thus requiring that the act should be done first, and the truth of the matters, suggested as a ground for it, inquired into afterwards. It is difficult to believe that such an unusual and inconvenient course of proceeding could have been intended by the terms of the proviso in the charter. If the charter had not contained the proviso, there can be no doubt but that a scire facias, at the instance of the Crown, to repeal the letters patent might have been maintained upon non-compliance with the directions, assuming them to be conditions. If the Crown succeeded upon the scire facias, the judgment could only be for an absolute revocation. There is nothing in the proviso to restrain the Crown from proceeding by scire facias to obtain such a judgment, if the truth of a suggestion of non-compliance with the conditions in the charter, or with any of them, is ascertained by verdict or admission by default: but the Crown has reserved to itself the power, in case of non-compliance with any of the directions and conditions of the charter, of revoking it, by writing under the great seal or sign manual, either absolutely or under such terms and conditions as the Crown might think fit. This gives to the Crown an additional power, which it would not have had if it had been left to the remedy by

scire facias only: for it gives the power of *qualified* revocation, to which the proceeding by scire facias is inapplicable. It may well be that it was intended by the proviso that the Crown should have the power, upon information of non-compliance with the conditions of the charter, to revoke it without a scire facias, absolutely or upon terms, by writing under the great seal or sign manual; leaving it to the grantees to institute counter proceedings by scire facias, or otherwise to vacate the instruments of revocation, on the ground of the Crown having been deceived by false information. This would, indeed, appear to be the only course that could be adopted in the case of a partial or qualified revocation; but by no means necessary where the Crown intended absolutely to revoke the charter if any of the conditions were not complied with; which could most conveniently be done by proceeding in scire facias, in which the truth of the suggestion may be tried, and, if found for the Crown, the letters patent will be absolutely revoked. I am therefore of opinion that the Crown might proceed by scire facias to repeal the letters patent, notwithstanding the proviso, if it intended that the charter should be absolutely, and not partially, repealed in case the suggestions of breach of the conditions of the charter were found to be true. But it was contended for the Corporation that, admitting that the Crown might in its own right proceed by scire facias for an absolute repeal of the letters patent, it would be utterly destructive of the power of qualified and partial revocation reserved to the Crown by the proviso, if a private prosecutor could be allowed to proceed by scire facias in the name of the Queen. There would be very great weight in this argument, if it could be made out

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that a private prosecutor could proceed, either without the leave of the Crown, or that the Crown's permission was so entirely a mere form that it could not under any circumstances be refused. The permission of the Crown is given by the assent of the Attorney General; and it was admitted, upon the argument, that the scire facias could not in this case have been brought or maintained without the assent of the Attorney General: and it must be assumed, as the case appears before us upon the record, that the scire facias was brought in the Queen's name with the assent of Her Attorney General, but upon the prosecution of Sir *James Brooke*. If the assent of the Crown be necessary before a proceeding can be taken in its name, which, if successful, would have the effect of absolutely revoking the letters patent, and such assent be given, it must be assumed that the Crown did not intend to exercise the special power, reserved by the proviso, of making a partial revocation, but that it proposed that the charter should be absolutely repealed if the suggestion of non-compliance with the conditions of the charter were found to be true; and that the Attorney General, therefore, on behalf of the Crown, authorized the proceedings at the instance of a private prosecutor which might have been brought directly by himself in the name of the Crown. The assent of the Attorney General to the prosecution of the scire facias by a private prosecutor in the name of the Crown would, as it appears to me, be of the same effect as if he had himself, on behalf of the Crown, directed the proceedings, unless he had no option in the matter, and was bound *ex debito justitiæ*, and at all events, to give his assent, whether he or the Crown agreed to the prosecution or not. It is said, in Sir

Oliver Butler's Case (a), that the Attorney General is bound, *ex debito justitiæ*, to give his assent to the prosecution of a *scire facias*, in the name of the Crown, by a private prosecutor, if such prosecutor has been injured by a patent, which may be avoided upon suggestion of facts which would defeat it. But that can mean no more than that the Attorney General *ought* in such a case to grant it, but not that he is at all events bound to do so. That no *scire facias* can be brought in such a case without the assent and fiat of the Attorney General, is clear; and the course of proceeding to obtain it is given in *Mr. Campbell Foster's Work on Scire Facias*, p. 249. It would not only be competent to the Attorney General to exercise his discretion in the matter; and if he saw no sufficient ground for giving his assent it would be his duty to withhold it: and I cannot assume that the Attorney General would give his assent to the prosecution of a *scire facias* to repeal letters patent by a private prosecutor in the name of the Crown, unless he was satisfied that, if the suggestions in the *scire facias* were true, the letters patent ought to be repealed. Upon the whole, then, it appears to me that the directions in the charter are in effect conditions: that the right of the Crown to maintain a *scire facias* to repeal the charter absolutely, for non-compliance with any of the conditions, is not restrained by the proviso: and that the assent of the Attorney General to the prosecution of the *scire facias* is of the same effect with regard to the maintenance of the proceeding as if the prosecution had been by the Crown itself. I am therefore of opinion that the rule should be discharged.

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COLERIDGE J. In this case, a verdict having passed *Coleridge J.*

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in scire facias on three issues against the defendants, a rule has been obtained and argued for the arresting of judgment on alleged defects in the declaration. And I am of opinion that that rule ought to be made absolute. In order to make the grounds of my judgment intelligible, it is necessary to premise that, by the charter which it is sought to annul, Her Majesty, after reciting, among other things, that certain persons had agreed to subscribe a capital of 200,000*l.*, incorporates them by the name of *The Eastern Archipelago Company*, in the usual form and with the usual incidents. The charter then proceeds to give several directions, the effect of which is to confer powers and privileges: and then it proceeds in these words (*a*), on which the case for the prosecutor arises. "And We do hereby further direct, that the sum of 100,000*l.*, at the least, being half of the aforesaid capital of the said Corporation, shall be subscribed for within twelve calendar months from the date of these presents, and that the sum of 50,000*l.*, at the least, shall be paid up within such period." Several other directions then follow, regulating the future administration and proceedings of the Corporation; amongst others, the following. "And We do hereby further direct that the said partnership shall not begin business until it shall have been certified to the said President of the Board of Trade, by at least three of the said Directors of the said Company, that, at least, one half of their capital before mentioned has been subscribed for, and the said sum of 50,000*l.*, at the least, paid up; such certificate of the said Directors to be indorsed on this Our royal charter, and to be sufficient evidence for the purpose of the aforesaid provision in that behalf." At the

(*a*) These clauses of the charter were set out by way of recital in the writ: see pp. 312, 314, 315, 317.

close of these directions follows this proviso, on the true construction and effect of which the case appears to me mainly to depend. "Provided always, and We do hereby will and declare, that, in case the said Corporation shall fail to enter into and execute such deed of settlement as aforesaid, and to deposit a copy thereof within the period limited in that behalf, and subject as aforesaid; or in case the said Corporation shall not comply with any other the directions and conditions in these Our letters patent contained; it shall be lawful for Us, Our heirs" &c., "by any writing under the great seal or under the sign manual of Us, Our heirs" &c., "to revoke and make void this Our royal charter, and every clause, matter and thing therein contained, either absolutely or under such terms and conditions as We or they shall think fit. Provided always that, notwithstanding anything herein contained, it shall be lawful for Us, Our heirs" &c., "either under our great seal or by writing under the sign manual of Us, Our heirs" &c., "at any period after the expiration of twenty one years from the date of these presents, to revoke and make void this Our royal charter, and every clause, matter and thing contained therein, or to add such modifications, conditions or provisions thereto as We, Our heirs" &c., "shall think fit." The usual provision is inserted that the charter shall be valid according to its true intent and meaning, and shall be taken, construed and adjudged in the most favourable and beneficial sense and for the best advantage of the said Corporation. A proviso follows (and, in one view of the case, it may perhaps be worth noticing that this is in terms an express condition, and the only one which the instrument contains): that "this Our royal charter is granted upon this express condition, that the said partnership hereby incorporated shall, at all times during the continuance

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of the said Corporation, abide by and conform to all and every the directions which may be given to the said Corporation by any one of the principal Secretaries of State of Us, Our heirs" &c., "as regards the intercourse and dealings by the said Company with any foreign state or power." Such being the charter, the pleadings raised issues on the subscriptions of 100,000*l.* and the payment of 50,000*l.* at the periods required by it, and at the time of commencing business by the defendants; and these issues were found for the Crown. But the defendants allege, in arrest of judgment, that the scire facias is defective, because it contains no allegation that, previously to its issuing, Her Majesty by writing under the great seal, or under her sign manual, had revoked or avoided the charter. The judgment, if this rule be discharged, will be that the letters patent be revoked, cancelled, vacated, annulled, void and invalid, and be altogether had and held for nothing, and that they be restored into the Chancery of our said Lady the Queen there to be cancelled, and also that the enrolment thereof be cancelled, quashed and annulled. The question, then, for decision is, Whether this judgment can pass in this case until Her Majesty shall by writing under the great seal, or under Her sign manual, declare Her pleasure to revoke and make void the charter? And, in coming to the conclusion that it cannot, I lay out of consideration, and do not at all rely on, any distinction between "direction" and "condition," which was noticed in the argument. I am willing to treat it as a case of condition broken by the grantees of the charter, which subjected them to its forfeiture. But I think, first, that we are bound to ascertain the true meaning and intention of the whole instrument according to the language in which it is expressed: secondly, that according to the

true meaning and intention of the charter it was voidable, only, on breach of any of these three conditions, at the pleasure of the Crown expressed in one or other of the specified modes: and, thirdly, that the law does not forbid the granting or accepting a charter so determinable. First, there is the less necessity for dwelling much on the first point, because, although the peculiar construction of grants from the Crown was much insisted on in the argument for the prosecutor, that point was made, principally, if not entirely, for the purpose of inducing the Court to consider that which the charter calls in terms a direction as a condition: and I am quite content to treat it as a condition, and to admit that it has been broken. Still it may be worth while to observe, upon this point, that, although in old books not a few cases may be found distinguishing between grants from the Crown and grants from the subject, on grounds, some of them hard to reconcile with justice or common sense, some of them reasonable enough at the time, with reference to the then condition and interests of the Crown, but wholly unreasonable now; yet the general principle, to be traced in the main current of authority, is both a just and a reasonable one, and establishes the same guiding principle of construction for instruments of both kinds. If indeed the King has been deceived by any false suggestion, as to what he grants, or the consideration for his grant; if he appears to have been ignorant or misinformed as to his interest in the subject matter of his grant; if the language of his grant be so general that you cannot in reason apply it to all that might literally fall under it; or if it be couched in terms so uncertain that you cannot tell how to apply it with that precision which grants, from one so specially representing the

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public interest, ought in reason to have; or if the grant, reasonably construed, would work a wrong or something contrary to law: in these and such like cases, the grant will be either wholly void, or restrained according to circumstances; and equally so whether the technical words *ex certâ scientiâ et mero motu* be used or not. But this is held upon the very same principle of construction on which a grant from a subject is construed; namely, the duty of effectuating the intention of the grantor. To hold the grants valid or unrestrained in the cases I have just put, would be, as is said, in *deceptione Domini Regis*, and not *secundum intentionem*. It is satisfactory to see this language of good sense used, even in times when the prerogative was at least sufficiently favoured in courts of law, and in the very books to which reference is made for a strict and unequitable construction. Thus in the celebrated *Case of Alton Woods* (a), which contains a store of learning on this head, in what Lord Coke calls the Lord Treasurer's brief and effectual judgment, it is laid down that "no violent or strainable construction is to be made of the King's grant, but his grant shall be taken in an usual and common sense, according to his intent and meaning." In *Sir John Molyn's Case* (b) Lord Coke desires the reader to "note the gravity of the ancient sages of the law, to construe the King's grant beneficially for his honour, and the relief of the subject, and not to make any strict or literal construction in subversion of such grants:" and Lord Chief Baron Comyns, *Dig. Grant* (G 12.), gives accurately the substance of this case, and of *Bewley's Case* (c) and *The Case of the Churchwardens of St. Saviour's, Southwark* (d),

(a) 1 Rep. 26 b. 52 b.

(c) 9 Rep. 130 b.

(b) 6 Rep. 5 b. 6 a.

(d) 10 Rep. 66 b.

in these words: "So, where the King's grant is capable of two constructions, by the one of which it will be valid, and by the other void, construction shall be made to make it valid; for that will be more for the benefit of the subject and the honour of the King, which ought to be more regarded than his profit." In the case now before us, and upon this motion, there is no legal ground for presuming, nor indeed am I aware, if we could look beyond the record, that there is any pretence for saying, that the Crown was misinformed or deceived in its grant. We are dealing with a condition subsequent not performed; and the only question in this part of my judgment is one of construction of language: What are the rights which the Crown has reserved to itself, on the happening of such event? Now, secondly, it appears to me perfectly plain that, in this instrument, and for a reason which the instrument itself sufficiently discloses, it was the intention of the Crown to reserve to itself a special power of revocation, either absolutely, or on condition, and that power only. The reason, to which I allude, is this. The Crown has, in the first place, incorporated the grantees absolutely and for ever; but it has guarded and accompanied its grant with many directions as to matters future, some of more some of less importance; some wherein failure of performance might go to the root of the grant, must be wilful, would be irreparable, and also irrespective of time; others of just a contrary character. It was wise therefore to make an absolute revocation the possible punishment in all cases; it was equitable also to retain a power of qualifying that revocation to meet the circumstances of some. For example, the 100,000*l.* might not have been subscribed for within the specified time; the Directors might have been cognizant

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of that, might have given a fraudulent certificate and commenced business. This would have been one case of breach of condition; and not a word could have been said against the justice of an absolute revocation for such wilful and fraudulent conduct in so important a particular. But the 100,000*l.* might also have been bonâ fide subscribed for within time, the certificate might have been given regularly, and business commenced, but through the neglect of an officer the indorsement on the charter might not have been made till the day after: this would have been another breach. But, in equity, or strict justice, ought the same consequence to follow? The prosecutor's construction will involve this conclusion: according to him there is no discretion in the Crown; the same judgment, if any, must pass in both; and that must be unqualified and absolute. Now his argument must rest on one of two grounds; for I presume he would not say we must sponge the proviso clean out of the charter; but he will say, either that, if you did strike out the whole of the special clause of forfeiture, still the breach of any condition is a ground of forfeiture at the election of the Crown; and that that ground remains untouched by the special clause remaining in: or that, if it were necessary to have the will of the Crown specially exercised, the fiat of the Attorney General, which must be granted before the issuing of the scire facias, was a conclusive expression of that will. Let us consider both of these grounds in order. The first of these, in the argument at the bar, was expressed by saying that the special and expressed power of revocation was only cumulative on the general and implied power. The term "cumulative" is not, I think, very correctly applied here. When

one thing is cumulative on another, whether it be remedy, penalty or power, we are speaking commonly of two things which are at least consistent, and might without incongruity be applied at the same time: as indictment and summary proceeding, fine and imprisonment, action for breach of covenant and ejectment for forfeiture. Two ways of doing the same thing, where only one of the two can in fact be used, make a case of election; but they are hardly cumulative. This, however, may be mere criticism on terms; and, if the special power in this charter had been limited to its unconditional avoidance, I do not know that there would be any ground for refusing to hold that the two might coexist, and the Crown might have its election. It would, even then, be very difficult to account for its introduction. Why introduce the term of writing under the great seal or under the sign manual, merely to do that which the law had already enabled to be done, and which might still be done without either? And upon a question of intention there would have been great weight in this objection. But the power is not so limited; it is extended to a conditional revocation also. The Crown under it may say to the grantees: "Unless within such a time, or in such a way, you do this or that, then We revoke and annul, but not otherwise, although there has been a breach of condition." Now this is a new power, not inherent in the Crown, not implied by law, existing only by virtue of express reservation. No judgment to this effect could be given as the result of a proceeding by *scire facias*. But this power cannot, in reasonable construction, be separated from the other; they are in fact two parts of one entire power. My present argument is simply on the reasonable construo-

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tion of the instrument only, apart from any legal difficulties, which I will not omit to consider in the last place. But, apart from these, if any such there be, I feel certain that no one could doubt that, whatever might be the condition of grantees under other charters, in this charter the law and mode of revocation was specially laid down in this sentence. These grantees were to understand they held *this* charter subject to this power of revocation, and this only. Commonly speaking, “*expressum facit cessare tacitum* ;” and this would seem a case in which the wholesome maxim eminently applies. But this is not all. I cannot but think there is much weight in the observation which arises on the additional and extraordinary power of revocation at the end of twenty one years, or to add new modifications, conditions or provisions at its pleasure, which the Crown has expressly reserved to itself. This again is purely the creature of the charter itself: the incorporation was made for ever; to give the members a perpetual succession was one of its special objects: yet the Crown has chosen to reserve the extraordinary power of destroying it, without any breach of condition or misprision of any kind, at the expiration of the short period of twenty one years. Does not this clause, placed where it is, in immediate sequence to the clause we are considering, help to shew that the matter of revocation is in this charter put on special grounds by agreement between the parties? I say “*agreement between the parties*,” because, though we are speaking of a charter from the Crown, and use properly the terms grantor and grantee, it must not be forgotten that even this is in its essence a compact, and that the Crown and grantee are mutually contracting parties. The grantee must accept before he

is bound by the terms; and I apprehend it to be a rule, as universal as it is wise, that, where a written instrument contains a specific provision as to a particular subject matter, the provision as to that matter, which the law would imply if the instrument were silent, cannot be resorted to. Here then the grantees have accepted a charter, which expressly provides for avoidance in a certain way and on certain conditions. If without this express provision the charter would have been voidable on breach of conditions, more simply and absolutely, so as to make the tenure of the grantees less advantageous, it seems to me only the more reasonable to infer that this express provision supersedes that other general and implied power of avoidance. We have no right to assume that the charter would have been accepted with the power of revocation at the end of twenty one years, unless this power of revoking conditionally only on breach of any direction had also been added. The one may have been the consideration for the other; and it cannot be assumed, as it was by *Mr. Hill*, that this was introduced merely to enlarge the Crown's power. In part it does enlarge it certainly; but in part also it restrains it. This whole clause appears to me to lay down the only law applicable to the subject. The liability, therefore, which would have been implied by law had there been no express provision does not exist.

Much of what I have said (at so much length, I am sorry to say) on this point applies to the other argument relied on for the prosecutor. In the ordinary case, I freely admit that the fiat of the Attorney General must be taken as the expression of the will of the Crown. It must be so in the present case as regards the mere issuing of the scire facias. I do not think the Court

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has power, in any case, to inquire whether the Attorney General has been well or ill advised in granting his fiat; and, in the present instance, I have no desire to raise any question upon it. Still, if the power of the Crown be limited, the power of the Crown's officer must be equally so. The rights of the grantee conceded by the Crown cannot be affected by the act of the Attorney General beyond the Crown's power. If the expression of the Crown's will, in the manner specified by the charter, be a condition precedent to the exercise of the Crown's power, the practice of Attorney Generals cannot do away with the necessity of satisfying that condition. I conclude, therefore, that, construing this charter according to the intention of the parties, to be gathered from its language, the only power of revocation or annulling reserved to the Crown is that which is specially expressed: and it only remains to consider, whether any rule of law prevents us from giving that effect to it which was intended. It has not been argued, and it certainly could not be in this proceeding, which assumes the original validity of the charter, that the Crown could not by law have a conditional instead of an absolute power of avoidance for breach of condition; and, if it might have it, it certainly might expressly reserve it. But it has been said that this particular reservation is so expressed as to be absurd and impracticable; for that it supposes first the charter to have been revoked and made void by the Queen's declaration under the great seal, or sign manual, and then that a scire facias is to issue for the purpose of procuring a judgment to avoid and cancel that which has already been so revoked and made void. If there be any difficulty on this account, it exists equally in regard of many letters patent for new inventions. In them it

is commonly provided that, "if it shall be made appear that the grant is contrary to law, or the supposed invention prejudicial to the subjects in general, or not new, or not found out by the patentee, then, *upon signification by the Crown under the signet or privy seal*, the letters shall be utterly void." Yet a scire facias, as we all know, would be necessary for the repeal of the patent after such signification made; and that for a reason which will be obvious presently. For, secondly, although the Queen should act upon the power reserved, and revoke and annul the charter, Her revocation will take no effect unless there had been in fact that breach of condition on which alone it depends: and that fact must be tried upon the suggestion in the scire facias. If the issue raised on it be found against the Crown, the revocation falls to the ground; and, if it be found against the grantee, then the revocation, which was only contingent before, becomes absolute. But, even then, there remains, thirdly, the cancellation to be awarded, the bringing in of the charter to be formally cancelled, and the enrolment in Chancery to be quashed and annulled. The office of the scire facias is twofold: first, to give an opportunity for ascertaining the fact upon which the force of the Crown's annulment depends; second, in case that fact be decided against the patentee, to procure the recording judicially of such annulment, and to compel the bringing in the letters patent, which are in the hands of the grantee, for cancellation, and to authorize the cancellation of the enrolment. I cannot think there is any reality in the difficulty suggested as to the mode of proceeding under the special power, either in the way of notice to the Crown of the facts on which it is to be exercised, or notice from the Crown to the grantees that it has been

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exercised. With regard to the former, the same mode might in substance be adopted as is now had recourse to in other cases of *scire facias*. The Crown's interests are abundantly protected by numerous officers who exist for the very purpose. It was never a very satisfactory notion, which we find in old books, "that the King hath the charge of the Commonwealth, and therefore cannot intend his private businesses;" and certainly it is one which has no place in these times, or in a case like this. In point of fact it is always found, I believe, that, either by the vigilance of its own officers, or from the communication of interested individuals, the necessary information reaches the Crown, and sets it in motion. As to the notice from the Crown to the grantees, surely it may be presumed that so important a proceeding as the special proviso here contemplates will never be had recourse to without a previous inquiry and communication to them. Whether the declaration by the Crown under the great seal, or sign manual, has in fact been made, of course there would be no difficulty in the Attorney General's ascertaining. The knowledge of the fact must be in the Crown's officers. It was, very properly, not contended in the argument that, if the exercise of the power of revocation was a condition precedent, it was not necessary to aver in the writ that it had been exercised. Without this allegation, and as the writ is now framed, it is perfectly consistent with all that would be in issue on this record that the Crown had exercised its special power of revocation conditionally only: so that, although the suggestions of breaches might be true, they had been condoned, and that no judgment of cancellation could by law issue. I am not aware that this objection has ever been raised before: and, as it is reasonably to be

presumed that it might have been on some occasions, if my opinion be correct, that fact is undoubtedly worthy of consideration, and entitled to much weight against its correctness. Still, where the general principles of reason and justice clearly concur in the support of a decision, these cannot be overruled simply by the circumstance that on no former occasion has the matter been brought into controversy. The effect is merely negative, and will not warrant me in withholding from the defendants the benefit of my opinion in their favour when the point is first raised. I conclude on the whole, on these grounds, that the rule for arresting the judgment ought to be made absolute.

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LORD CAMPBELL C. J. I am of opinion that the rule for arresting the judgment in this case ought to be discharged. The question may be considered as if the scire facias contained only the suggestions to which the defendants pleaded the 5th, 10th and 13th pleas, the issues on these pleas being found for the Crown. The charter, by which the Company was incorporated, contains the following clauses (a). "And We do hereby further direct that the sum of 100,000*l.*, at the least, being one half of the aforesaid capital of the said Corporation, shall be subscribed for within twelve calendar months from the date of these presents, and that the sum of 50,000*l.*, at the least, shall be paid up within such period." "And We do further direct that the said partnership shall not begin business until it shall have been certified to the President of the said Board of Trade by, at least, three of the Directors of the said Company, that at least one half of their capital before mentioned has been subscribed for, and the said sum of 50,000*l.*, at the

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(a) See recitals, *antè*, pp. 312, 314.

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least, paid up, such certificate of the said Directors to be endorsed on this Our royal charter, and to be sufficient evidence for the purpose of the aforesaid provision in that behalf." The scire facias contains the following suggestions (amongst others). "And also that the said sum of 50,000*L.*, at least, of the said capital of the said Corporation had not been paid up within the said period of twelve calendar months from the date of Our said letters patent;" and "also that, although the said partnership began business on a certain day," "yet, at the time when the said partnership so began business, 50,000*L.* of the capital of the said partnership had not been paid up:" and also that, "although the said partnership began business on a certain day," "and although, at the time when the said partnership so began business, one half of the capital of the said Company had not been subscribed for, nor had the sum of 50,000*L.*, at the least, of the said capital been paid up, yet it had been certified to the President of the said Boad of Trade by the Directors of the said Company, falsely and untruly, that at least one half of the capital of the said Company had been subscribed for, and the said sum of 50,000*L.*, at the least, paid up, in violation of the provisions in the said letters patent in that behalf contained: whereas, in truth and in fact, at the time of giving such last mentioned certificate, one half of the said capital of the said Company had not been subscribed for, nor had the said sum of 50,000*L.*, at least, of the said capital been paid up, *as the said Directors then well knew.*" The defendants, by their 5th plea to the suggestion "that the sum of 50,000*L.*, at least, of the said capital of the said Corporation had not been paid up within the said period of twelve calendar months from the date" of Her Majesty's said letters patent, plead that the sum of 50,000*L.* had

been paid up pursuant to the provisions of the said letters patent in that behalf within the said period of twelve months from the date of Her Majesty's said letters patent. By their 10th plea, to the suggestion that, "at the time when the said partnership so began business, 50,000*l.* of the capital of the said partnership had not been paid up," the defendants pleaded that, on the day when the said partnership so began business, the sum of 50,000*l.* had been paid up, pursuant to the provisions of the said letters patent in that behalf. And, as to the last suggestion (respecting the certificate), the defendants, by their 13th plea, pleaded that, at the time of the giving of the said certificate, one half of the said capital had been subscribed for, and the sum of 50,000*l.* had then been paid up, pursuant to the provisions of the said letters patent in that behalf. The issues on these three pleas were found for the Crown; and the propriety of the verdict is not questioned. But we are called upon to arrest the judgment on the alleged insufficiency of the declaration in *scire facias*. It was hardly questioned by the counsel for the defendants that the declaration, as framed, would have been sufficient had it not been for the proviso in the charter, declaring that, in case the Corporation should not comply with the directions and conditions contained in the charter, it should be lawful for the Queen, by any writing under the great seal or under the sign manual, to revoke and make void the said charter and every clause, matter and thing therein contained, either absolutely, or under such terms and conditions as Her Majesty should think fit. There seems to be no doubt whatever, that without this proviso it would have been competent either for the Attorney General, ex

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they are void, or if, after the grant, there has been a breach of any condition subsequent whereby they are voidable, the prerogative writ of *scire facias*, to repeal them, may be sued out, either directly by the Crown, or, with the consent of the Crown, on the relation of an individual who may be injured; and in the subsequent proceedings it is wholly immaterial whether the *scire facias*, which in all cases must be in the name of the King, has issued with or without a relator. But the defendants' counsel strenuously and powerfully contended that, regard being had to the proviso in this charter for a proceeding by writing under the great seal or under the sign manual, in case the Corporation should not comply with any of the directions and conditions contained in the letters patent, either that *scire facias* could not be brought, or, at all events, that *scire facias* could not be brought until the Queen has revoked the letters patent by writing under the great seal or sign manual; and that this declaration in *scire facias* is defective in not containing an allegation that there had been such a revocation.

After a very attentive consideration of the charter, I am of opinion that the proviso in no respect limits the power of proceeding by *scire facias* which would otherwise have existed, and that it only gives a cumulative or additional remedy, by enabling the Crown in a summary manner to revoke the charter or to modify it. The supposition, that it takes away all power to proceed by *scire facias* to have the letters patent cancelled, cannot possibly be sanctioned, and indeed was nearly abandoned during the argument, chief reliance being placed upon the proposition that, before proceeding by *scire facias*, the Crown was bound to revoke the letters patent by writing under the great seal or sign manual, and that the declaration in *scire*

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facias should have averred such a prior revocation. We are called upon to say that the Crown, by the proviso, instead of increasing its power, imposed upon itself a disability to proceed by scire facias without first revoking and making void the charter by writing under the great seal or sign manual. In the first place, it is very difficult to imagine how such a proceeding to cancel letters patent could be conducted; and no instance of such a proceeding can be discovered, although a similar power of summary revocation has been contained in all letters patent granted for inventions since the passing of the Statute of Monopolies (21 *Ja.* 1. c. 3.). It is admitted that by equivocal words the power of the Crown cannot be abridged: but it was urged at the bar that the construction of the defendants protects the power of the Crown, by preventing private prosecutors from repealing the charter under a scire facias for an unintentional and immaterial breach of a condition which the Crown would be willing to overlook. This argument seems to me to be founded upon the fallacy that any of the Queen's subjects may at pleasure sue out a scire facias to repeal letters patent. No such scire facias can be sued out without the consent of the Crown, given through the agency of the Attorney General. Although I myself had the honour to fill this office for more than seven years, I will not venture to rely on my own knowledge of the existence of the Attorney General's authority, or my own recollection of the manner in which it is exercised. In note (4) to *Underhill v. Devereux*(a), where the decisions upon scire facias to repeal letters patent are collected, it is laid down that "no scire facias can be sued out in this case until the King's attorney general grants his fiat

(a) 2 *Wms. Saund.* 72 u (6th ed.).

to take it out." In Mr. *Campbell Foster's* valuable book on *Scire Facias* (p. 249), he thus states the practice: "The prosecutor, or his solicitor, having prepared a draught of the writ, as directed by the above statute, must lay a fair copy of it before the Attorney General, together with a statement of the facts on which it is founded, in order to obtain his fiat, which must be filed in the Petty Bag Office, to authorize the issuing of the writ, and without which the writ cannot be sealed:" and, at p. 250: "It has been the practice of Attorneys General only to grant the requisite fiat to enable the prosecutor to sue in the name of the Queen, on condition that he enters into a bond of indemnity, to be taken in the name of the clerk of the Petty Bag, with two sufficient sureties in ordinary cases, and for such sum as the Attorney General shall name, to pay the patentee the amount of his costs taxed as between attorney and client, if the action against him should fail." Mr. *Hindmarch*, in his *Treatise on The Law relating to Patent Privileges, &c.*, p. 387, adds: "This security was first required to be given by Sir *Archibald Macdonald*, when he was Attorney General about the year 1790, the amount of the bond then required being 500*l.* But since the year 1836, when Sir *John* (now Lord) *Campbell* was Attorney General, the amount has been 1000*l.* in ordinary cases. The amount of the bond in other cases is entirely discretionary in the Attorney General, who, will, in extraordinary cases, order security to be given to a sufficient amount to cover the probable extent of defendant's costs in defending the action." Stat. 11 & 12 *Vict. c. 94. s. 26.* requires the name of the prosecutor to be inserted in the writ of *scire facias*; but with a proviso, "that nothing in this Act contained shall authorize the issuing

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of any such writ of scire facias aforesaid without the fiat or leave of her Majesty's Attorney General." It likewise appears, by these books of practice, that the defendant may be heard to shew cause before the fiat is granted, and that, after the fiat has been granted and the scire facias has been sued out by the relator, the Attorney General preserves a controul over the action, as he does over a charity information where there is a relator; and he may order a nolle prosequi to be entered as to any suggestion which he thinks is unfairly introduced. See *Webster's Reports &c. on Letters Patent*, p. 671, note (i). The defendant's counsel then rely upon dicta, to be found in the books, that this fiat is "matter of right." It is matter of right to all who are justly entitled to it; but those only are justly entitled to it who suffer a prejudice by the letters patent, and the breach of the condition upon which they have been granted. No mandamus would lie to the Attorney General to grant his fiat for a scire facias. If he were improperly to withhold it, he might be questioned in Parliament; and he might be punished for his misconduct. But, upon such a complaint being brought forward against him, if he could shew that the applicant had no interest whatever in the subject matter, and was only actuated by spleen or malevolence, and that it was for the public advantage that the letters patent should not be assailed, instead of being punished he would be applauded. It is then said that extreme hardship would arise to this Company, and other companies incorporated in the same manner, if a scire facias actually to cancel the charter were to issue for the breach of some unimportant condition, instead of the milder power being exercised of altering the charter. We know nothing of what passes before the Attorney General when he grants

his fiat for a scire facias: but we must suppose that he has duly exercised his power. It is possible that, in this case, evidence was laid before the Attorney General of the gross fraud respecting the false certificate that the capital of 50,000*l.* had been paid up, which is suggested in the scire facias, and which was proved to the satisfaction of the jury; whereby there was a failure of consideration, and the object of granting a charter, to work mines abroad with capital to be subscribed at home, may have been entirely defeated. At any rate the possibility of power being abused is no conclusive argument against its existence; for, under every form of government, there must be lodged in certain functionaries discretionary powers to be exercised under a responsibility for the abuse of them, without allowing the validity of the act done to be judicially questioned. In this case we are bound to presume that the scire facias proceeded with the approbation of the advisers of the Crown, and not in contravention to their wishes or intentions. It seems to me, that to construe the proviso giving a power to the Crown summarily to revoke the charter as a restriction upon the power of the Crown to proceed by scire facias would be contrary to the rules of law and to the intentions of the parties. The charter may be construed so as in all its parts to work harmoniously, by supposing that the summary power reserved by the proviso is cumulative or additional, leaving the remedy by scire facias to remain as if the proviso had never been introduced. The notion of a scire facias after a revocation by writing under the great seal or sign manual never seems to have been contemplated, and is wholly inconsistent with the power of modifying the charter; for upon scire facias the judgment is *quòd cancelletur*. That the exercise of the

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summary power was to be final is further shewn by the power, under the proviso, to the Queen, at any period after the expiration of twenty one years, by writing under the great seal or sign manual, to revoke and make void the charter or to modify it as she should think fit, without any breach of any condition or any default whatsoever, and without any possibility of following up the revocation by scire facias. These are extraordinary powers, enabling the Crown to put an end to a franchise without a scire facias: but it was for the grantees to consider whether they would accept a charter reserving powers to the Crown which without this express proviso it would not possess at common law. It was urged, however, that the implied power of proceeding by scire facias in the usual manner must be understood to have been renounced by the Crown, when the proviso to proceed in another manner is expressly mentioned. This argument, if valid, would prevent a scire facias from being brought to repeal a patent for an invention, at least until it has been revoked by the Queen or six of her Privy Council. In every such patent there is a proviso that, if the invention is not new, "then upon signification or declaration thereof to be made by Us, Our heirs or successors, under Our or their signet or privy seal, or by the Lords and others of Our or their Privy Council, or any six or more of them under their hands, these Our letters patent shall forthwith cease, determine, and be utterly void to all intents and purposes, anything hereinbefore contained to the contrary thereof in any wise notwithstanding;" *Hindmarch on Patents*, 62. The condition here mentioned, on which this summary power may be exercised, may be considered a condition precedent, the breach of which makes the letters patent

void ab initio: but suppose the same power had been reserved for breach of the condition that the patentee shall within a specified time inroll a specification of his invention: the letters patent would for this purpose be identical in their frame with the present; and, upon this supposition, could it be doubted that a scire facias might be brought by the Crown to repeal the letters patent on the ground that there had been no sufficient specification of the invention inrolled, although there had been no prior revocation under the reserved power by the Queen or the Privy Council? I cannot find that this summary power ever has been exercised: and letters patent for inventions have been acted upon, and repealed, as if they contained no such proviso. But, to shew what the understanding of the profession has been, I may refer to a section, in *Mr. Hindmarch's* book on Patents, p. 431, entitled "Of the Revocation of a Patent by the Queen or Privy Council." The learned author, after pointing out the delay and expence occasioned by a scire facias, says: "But by this proviso the Queen or her Council may declare the cause of invalidity, and the declaration will of itself have the effect of revoking or avoiding the patent, and of course of rendering all further proof than the declaration itself unnecessary. The grant of a patent is a matter of grace and favour, and therefore as we have seen, the Crown may annex any conditions it pleases to the grant." This summary power, if exercised, is considered not to be necessary or ancillary to a scire facias, but to leave the power of proceeding by scire facias untouched and entire, as if the summary power expressly introduced had been omitted altogether from the letters patent. I think that letters patent giving a monopoly for an inven-

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tion and letters patent creating a trading company, if framed in the same manner, must be construed on the same principles. With regard to the former, in practice much more facility is likely to be given to writs of scire facias; for, if a monopoly is claimed for a manufacture which is not new, every member of the community may be considered as in some measure aggrieved, and entitled to a remedy. But there may be conditions, contained in letters patent creating a trading company, in which hardly an individual in the kingdom has the slightest interest, and the breach of which therefore may afford no reason for the Crown consenting to a scire facias at the prayer of a relator. In the latter class of cases much more caution is likely to be exercised; and we may conjecture that the Attorney General would not grant his fiat without consulting the Board of Trade, by whose advice the charter was granted. But, the scire facias having proceeded, I am of opinion that, in point of law, the reserved summary power of revocation is equally to be disregarded with respect to both classes of letters patent. I beg particularly to draw attention to the concluding clause (*a*) of the charter: "Provided always, and We do hereby direct and declare, that this Our royal charter is granted upon this express condition, that the said partnership, hereby incorporated, shall, at all times during the continuance of the said Corporation, abide by and conform to all and every the directions which may be given to the said Corporation by any one of the principal secretaries of state of Us, Our heirs or successors, as regards the intercourse and dealings by the said Company with any foreign state or power." Now, suppose the scire facias had alleged a flagrant breach of this

(*a*) Recited *anté*, p. 317.

express condition, whereby the friendly relations between this country and a foreign state have been disturbed: would the declaration still have been bad for not stating a revocation under the great seal or sign manual? There seems to be no doubt that, for breach of this condition, the Attorney General might at once have proceeded by scire facias: and between express and implied conditions in royal grants hitherto no distinction has been made as to the remedies of the Crown. I would further observe that, by the construction of this charter which seems to me to be the right one, the Queen cannot be deprived of the power of revoking the charter "under such terms and conditions" as Her Majesty may "think fit;" for the consent to the scire facias might have been refused, with a view to such a proceeding. We are bound to believe that no modified revocation of the charter, under the great seal or sign manual, has ever been in contemplation; and, on the contrary, that it is the wish of the Crown, for the reasons set out in the writ of scire facias running in the Queen's name, that the charter should be absolutely annulled and cancelled. I have only further to observe, in answer to an observation urged by the defendant's counsel, that I do not consider the fiat of the Attorney General any exercise of the summary power of revocation; and that my opinion rests upon this principle, that, as far as the proceeding by scire facias is concerned, the charter is to be construed and acted upon exactly in the same manner as if the summary power of revocation mentioned in it were annihilated.

For these reasons I concur in the opinion expressed by my brother *Wightman*. As my brother *Coleridge* and my brother *Erle* are of a contrary opinion, so that the Court is equally divided, I presume that the rule will drop, and judgment will be given for the Crown. But

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The Court being equally divided, the rule dropped.

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[November 11, 1852.] WILLIAM HENRY GREGORY *against* THOMAS COTTERELL, RICHARD SWIFT, and ABRAHAM SLOWMAN.

Trespass against the sheriff and *S.* for breaking a house and taking goods. Plea by *S.*, severing in his pleadings from sheriff, alleging a writ of *fi. fa.* directed

TRESPASS for breaking plaintiff's house, and seizing his goods. The defendant *Slowman* severed, in his pleadings, from the other defendants.

Pleas by *Slowman*. 1. Not guilty. Issue thereon. 2. A writ of *fi. fa.*, directed to the Sheriff of *Middlesex*, on a judgment recovered, in the Queen's Bench, by one

to the sheriff, a warrant by the sheriff to *S.* as bailiff, and justification as bailiff. Replication, alleging a prior warrant to *J.* as bailiff, a seizure by *J.* under the writ, and payment by plaintiff to the sheriff in satisfaction of the writ, before the warrant to *S.* Rejoinder, traversing the prior seizure under the writ, and the payment to the sheriff.

On the trial, the sheriff and *S.* appeared by different counsel. It appeared that the sheriff made a warrant to *J.*; that *J.* sent *L.*, his general manager, to execute it, and *L.* entered the plaintiff's house and seized his goods. Plaintiff sent to the office of the bailiff *J.*, and there paid the amount to *L.*, who, in *J.*'s name, withdrew the man in possession, and sent notice to the execution creditor that the money was ready. In the course of the same day *J.* died; and the money was not found. The sheriff, knowing the facts, made a fresh warrant to *S.*, who seized plaintiff's goods and held them for several days. The jury did not agree as to whether *L.* actually paid the money to *J.* before his death; but they found that *L.* was authorized by *J.* to execute the warrant, and to receive the money. The Judge ruled that the jury might find for the plaintiff. The counsel for the sheriff excepted. The counsel for *S.* did not. The jury assessed the damages at 400*l.*

The counsel for the sheriff moved for a new trial, on the ground that the damages were excessive. Held, that he might do so without abandoning the bill of exceptions, as this was a point which could not have been included in it; but that the jury were justified in giving vindictive damages in such a case against the sheriff; and the rule was refused.

The counsel for *S.* moved for a new trial, on the ground of misdirection and that the damages were excessive as against *S.* Held, that there was sufficient evidence of a payment to *J.* the bailiff, under an execution de facto; and that, assuming the seizure by *L.* in *J.*'s absence to be irregular, still the payment was good; and the rule, on the ground of misdirection, was refused.

But held that the damages were excessive as against *S.* alone; and a rule nisi was granted to raise the question what is the measure of damages as against joint wrongdoers, one of whom has acted under aggravating circumstances not affecting the other. An arrangement having been made, this rule dropped; and the question was not further discussed. *Idco quare.*

Thomas Baker against the plaintiff, endorsed to levy 257*l.* 11*s.*, which writ was delivered to the other defendants as such sheriff: a warrant from the sheriff to the defendant *Slowman* and one *Daniel Gover*, who were bailiffs of the sheriff: and a justification of the trespasses under such warrant: verification. Replication: That, after the delivery of the writ to the sheriff, and before the making by the sheriff of the warrant to the defendant *Slowman*, the sheriff made a warrant to *Emanuel Jones*, then a bailiff; and that, by virtue of the said writ and warrant to him, the said *Emanuel Jones* entered plaintiff's house and seized his goods: that afterwards, and before any sale of the goods, and whilst *Jones* was in possession as such bailiff, the plaintiff paid the other defendants, *Cotterell* and *Swift*, as such sheriff, and they, as such sheriff, accepted and received, 270*l.* 13*s.* 3*d.*, being the full amount which they were entitled to levy; and so the writ then became satisfied: verification. Rejoinder: That *Emanuel Jones* did not under the writ seize the goods, nor did plaintiff pay the sheriff, nor did the sheriff accept, the money modo et formâ: conclusion to the country. Issue thereon.

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The pleadings by the other defendants raised other issues of fact.

On the trial, before Lord Campbell C. J., at the *Middlesex* sittings after last *Trinity* term, it appeared that the sheriff had made out a warrant and delivered it to *Emanuel Jones*, who was a bailiff. *Jones's* son, *Edward Lewis* (a), who in practice acted as the bailiff's clerk and head officer, went to the house of the plaintiff,

(a) The real name of both the bailiff and his son was *Levy*: but the father was known by the name of *Jones*, and the son by the name of *Lewis*; and throughout the proceedings they were called by their reputed names.

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entered and seized the goods of the plaintiff, and went away, leaving a man in possession. The plaintiff, having the money ready, offered it to the man in possession, who refused to take it, but referred plaintiff to the office of the bailiff *Jones*. The plaintiff's solicitor, on his behalf, went to the office. *Jones* was then confined to his bed by illness; and he died, after the solicitor arrived, in the course of the day: but it appeared, by the evidence, that he was not at the time of the payment insensible. The plaintiff's solicitor did not see *Jones*, but saw his son *Lewis*, who acted as his clerk and managed the office. *Lewis* received the money, gave directions, in *Jones's* name, to the man in possession to give up possession, which he did; and *Lewis* sent notice to *Baker*, the execution creditor, in *Jones's* name, that the money was levied and was ready at *Jones's* office. *Baker's* solicitor thereupon went to the office. Before his arrival *Jones* was dead; and the solicitor did not obtain the money. The sheriff, being ruled to return the writ, after several applications before a Judge for further time, was obliged to return it. The sheriff then, treating the first levy as a nullity, issued a fresh warrant, which was directed to *Slowman* and *Gover*. Under this writ the plaintiff's goods were seized, and the man remained in possession for several days. The goods were not sold, an arrangement having been made by which the plaintiff gave security to pay the amount if ultimately found liable. There was contradictory evidence as to whether *Slowman* or *Gover* was the bailiff who in fact executed the writ. It was admitted that the second seizure was conducted by the bailiffs as civilly and with as little annoyance as was practicable. *Lewis*, who was a witness at the trial, swore positively that he paid the money, as soon as received, to his dying father

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Jones; but there was strong contradictory evidence on this point. There was evidence that *Lewis* in practice had always acted as if authorized to do everything for his father, the bailiff *Jones*. On this evidence (which in some respects is given in more detail in the judgment of the Court) the Lord Chief Justice, at the trial, took the opinion of the jury, whether in fact *Lewis* did pay over the money to the bailiff *Jones* before his death. On this point the jury did not agree. They said, in answer to questions from the Lord Chief Justice, that *Lewis* executed the warrant by the directions of *Jones*, and had authority from *Jones* to act for him in the office; and, further, that the money was received by *Lewis* in pursuance of such authority. The Lord Chief Justice then told the jury that, if they were of that opinion, they might find that the money had been paid to the sheriff. To this direction the counsel for the defendants *Cotterell* and *Swift* excepted. The other issues were left to the jury, who found a general verdict for the plaintiff: damages 400*l.* In last *Hilary* term (*a*),

Bramwell, for the defendants *Cotterell* and *Swift*, without abandoning the bill of exceptions, moved for a new trial on the ground that the damages were excessive. [Lord *Campbell* C. J. You have a right to do so, because that is a point which could not be included in the bill of exceptions. That is the distinction: a plaintiff cannot select one point on which to go into error, and apply to the Court in banc on another. He must elect to take all the points on which he relies into error, or none. But, if there is any point

(*a*) November 3d, 1852, before Lord *Campbell* C. J., *Coleridge*, *Wightman* and *Erle* Js.

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which could not in any way be taken into error, he may come to the Court in banc upon that, without abandoning his writ of error on the others.]

The rule was refused on the merits, the Court intimating that the sheriff had behaved oppressively, and that the jury were justified in giving vindictive damages, and that the Court could not say 400*l.* was too much. On a subsequent day in the same term (a),

M. Chambers, on behalf of *Slowman*, who had not joined in the bill of exceptions, moved for a new trial, on the grounds of misdirection, and that the verdict against *Slowman* was contrary to the weight of evidence, and the damages, as against him, excessive. The grounds on which he moved on the two last points are sufficiently indicated in the judgment. The Court enquired whether the plaintiff would not enter a *nolle prosequi* as against *Slowman*. *Edwin James*, for the plaintiff, declined to do so, on the ground that he feared advantage might be taken in error by the other defendants, if any such entry were made. *M. Chambers* then quoted some parts of the Lord Chief Justice's summing up, in which his Lordship, whilst explaining to the jury what damages they might give, dwelt on the hardship on the plaintiff, and had pointed out that the plaintiff, after offering the money to the man in possession, and after this was refused, had paid it at the bailiff's office, and had afterwards had his goods seized afresh; and that, if such a practice prevailed, a debtor might be taken in execution after paying the amount recovered.

M. Chambers, in support of his application in respect of the alleged misdirection. The expressions used would lead the jury to believe that, as a matter of law, a person taken in execution is entitled to his discharge on paying the sheriff's officer. That is not so; *Woods v. Finnis* (a). Also the seizure by *Edward Lewis* (who was not named in the warrant), in the absence of *Emanuel Jones*, was not a seizure by *Jones* under the warrant; *Barratt v. Price* (b). And though a receipt of the money by *Jones* might have been a receipt by the sheriff, yet a receipt by *Lewis*, though it might bind *Jones*, *Lewis* being his agent, could not bind the sheriff. *Jones* was clothed with a personal trust from the sheriff, which he could not confer on *Lewis*. And, therefore, the ruling that the jury, who had not found any personal payment to *Jones*, might nevertheless find for the plaintiff on the second issue raised on *Slowman's* pleadings, was wrong.

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Cur. adv. vult.

Lord CAMPBELL C. J., on a subsequent day (*November 11th, 1852*) in *Hilary* term, delivered the judgment of the Court.

The first ground of the application, on behalf of the defendant *Slowman*, was that, upon the plea of Not guilty, there was no evidence against him to be submitted to the jury. We are clearly of opinion that there was evidence, which, if unanswered, would have justified the jury in inferring that the second levy in the plaintiff's house was authorized by *Slowman*; and indeed Mr. *Chambers* hardly contended that upon this issue there was not evidence against him which required an answer.

(a) 7 *Exch.* 363.(b) 9 *Bing.* 566.

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But Mr. *Chambers* very confidently insisted that, as *White*, who actually entered under the second warrant, being called as a witness by *Slowman*, swore that he was put into possession by *Gover*, who was likewise named as a bailiff in the warrant with *Slowman*, and that *Slowman* had nothing to do with the transaction, the weight of evidence was in favour of *Slowman*; the jury upon this evidence might have found in favour of *Slowman*; but, as *Slowman* himself might have been called as a witness to prove that he had nothing to do with the transaction, and he was not called, we cannot say that the jury were wrong in coming to the conclusion that he was guilty of committing the trespasses stated in the declaration. Mr. *Chambers* then contended that there was no evidence adduced by the plaintiff to support the issue taken upon his replication to *Slowman's* special plea of justification under the warrant directed to him by the sheriff. It will be material to see distinctly what this issue was. In this special plea *Slowman* states the issuing of the fieri facias at the suit of *Baker* against *Gregory*; the warrant to *Slowman* and *Gover*; the delivery of the warrant to *Slowman*; his entry into the plaintiff's house, and his seizing the plaintiff's goods under this warrant. The replication to this plea avers that a prior warrant was granted under the fi. fa. to *Emanuel Jones*; that this warrant was delivered by the sheriff to *Emanuel Jones*; that under this warrant *Emanuel Jones* entered the plaintiff's house and took his goods; and that afterwards, and before the grant of the warrant to *Slowman*, the plaintiff paid to *Cotterell* and *Swift*, the codefendants, as sheriff, and they, as sheriff, accepted and received from him, 270*l.* 13*s.* 3*d.*, the same being the amount of the moneys directed to

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be levied by the said writ of fi. fa. in full satisfaction and discharge thereof. *Slowman*, by his rejoinder, says that *Emanuel Jones* did not enter and take plaintiff's goods under the fi. fa. and warrant directed to him; nor did the plaintiff pay to the other two defendants as sheriff, nor did they accept or receive of and from the plaintiff, the said sum of money mentioned in the replication in full satisfaction and discharge of all the money directed to be levied by the writ and warrant. Now we consider the real issue taken to be, Whether, before the granting of the second warrant to *Slowman*, there had been an execution under the first warrant granted to *Emanuel Jones*, and the plaintiff had paid to the sheriff, and the sheriff had accepted from the plaintiff, the 270*l.* 13*s.* 3*d.* in satisfaction of the moneys to be levied by virtue of the writ and the warrant directed to *Emanuel Jones*. If there had been an execution de facto levied under the writ and warrant, and, before the second warrant was granted to *Slowman*, the money to be levied under the writ had actually been paid to the sheriff, and accepted in satisfaction of all the money to be levied, we do not think that any irregularity in the execution could be taken advantage of by the sheriff, or those acting under the sheriff, so as to enable them to set up the validity of the second warrant, subsequently granted, when the sheriff had in his hands money amply sufficient to satisfy the judgment creditor. Now we think that there was sufficient evidence, adduced by *Gregory* the plaintiff, to prove that after an execution de facto, under the warrant directed to *Emanuel Jones*, the plaintiff paid to the sheriff, and the sheriff received from the plaintiff, the whole of the money to be levied in satisfaction of the writ and the warrant. Without considering how far *Edward Lewis*, under

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the circumstances proved, was justified in entering the plaintiff's house, there can be no doubt that *Emanuel Jones* was constituted the agent of the sheriff to make the levy: and there was evidence that a payment at his office, in the manner proved, was to be considered a payment to him, and to the sheriff. If what was then done could not be enough to discharge the execution and protect the plaintiff from a fresh execution, the subjects of this country, against whom a judgment has been obtained, and whose goods have been taken under a *fi. fa.*, would indeed be in a very deplorable condition. The plaintiff repeatedly offered to pay the man in possession the full amount of the demand, but was told that he must send the money to the office of the bailiff named in the warrant, who would give a discharge under which the execution would be withdrawn. It was proved that, by the invariable course of proceeding in the office of the sheriff of Middlesex, this is the course in which executions are paid off and satisfied; and no other mode of paying off an execution under a *fi. fa.* has been suggested. The money was not actually paid to *Emanuel Jones* in person, because he was ill in bed; but it was paid at his office to his clerk and agent, who was in possession of his books and papers as bailiff, and was employed and authorized by him to conduct the execution, and to receive the money. *Edward Lewis* further swore that he had actually paid over the money immediately to *Emanuel Jones*; but the payment to *Edward Lewis*, under the circumstances proved, is, we conceive, evidence of a payment to the sheriff; and we think that the jury were justified in finding for the plaintiff the issue taken by the rejoinder.

Mr. *Chambers* complained likewise of misdirection in respect of an observation made by the Judge at the trial

respecting an execution under a *capias ad satisfaciendum*. Had the Judge stated that a payment to the officer who executes such a writ would render the sheriff liable, this could not be considered a direction, in point of law, upon any issue joined, which of itself would entitle the defendant to a new trial; but in truth the Judge was only pointing out to the jury the lamentable condition of the party subject to a second execution under a *fi. fa.* after the sheriff has received the money; and he observed that the same alarming principle might be extended to an execution under a *capias ad satisfaciendum*.

The last ground of the application was that the damages were excessive. We have already expressed an opinion that, as far as the sheriff is concerned, the verdict ought not to be disturbed on account of the damages; and to this opinion we adhere. If the second execution had been put in merely by mistake, or with a view *bonâ fide* to try any question which might fairly have been tried between the sheriff and the plaintiff, we should have thought the damages excessive against the sheriff, as they greatly exceed the pecuniary loss sustained; and, notwithstanding our reluctance to interfere with the amount of discretionary damages, we should have been inclined to submit the case to another jury. Sheriffs acting *bonâ fide* are entitled to and will always receive the protection of the Court. But in now dealing with this part of the application we must consider that the action is without defence, and that the money had been paid to the sheriff under the first execution before the second warrant was granted. We must likewise remember that, before the second warrant was granted, the sheriff, or those who represented the sheriff, well

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knew that the money had been paid at the office of the bailiff in the usual course of dealing, and that a discharge had been given, and notice had been served on the attorney of the judgment creditor that the money was ready for him. It is quite clear that, in the attendances before the Judge, when application was made by summons to enlarge the time for returning the writ, all these facts must have been disclosed and discussed. Was it not then the duty of the sheriff to have immediately paid the amount of the levy to *Baker*, as was afterwards done after the second levy, and to have proceeded against *Emanuel Jones* or his sureties? Instead of this, the sheriff, without any request from *Baker*, spontaneously granted the second warrant to *Slowman*, not even giving notice to *Gregory* that such a step was to be taken. What fair question was there to be tried between the sheriff and *Gregory*? The sheriff could only seek to take advantage of some irregularity in his own officer, as that *Emanuel Jones* was not actually present at the moment when *Edward Lewis* entered *Gregory's* house, or that *Emanuel Jones* was not actually present in his office when the money was paid to his clerk. If such points when taken are found untenable, ought the remedy of the party who suffers from them to be confined to the pecuniary loss sustained? The jury appear to have thought that this was a case in which the process of the Court had been abused, and a gross outrage was committed under the forms of law. We cannot say that they were wrong in coming to this conclusion; and if they were right we should not be justified in interfering, on behalf of the sheriff, with the amount of compensation which they have awarded in the exercise of their constitutional functions. But, possibly, a diffe-

rent question may present itself when the application is made on behalf of *Slowman*, the officer, who does not appear to be implicated in the aggravations which might justify the amount of damages as against the sheriff. It has been said that in an action of tort against several defendants, who have taken different parts in the transaction, the measure of damages ought to be the sum which ought to be awarded against the most guilty of the defendants. But, as our suggestion that a nolle prosequi should be entered as to *Slowman* has not been accepted, we wish to afford an opportunity for discussing whether there be such a doctrine, and how far it applies to the present case. We therefore grant to *Slowman* a rule to shew cause why there should not be a new trial, on the ground that the damages are excessive, and on that ground only.

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Rule nisi granted.

The plaintiff having come to an arrangement with *Slowman*, by which the damages were not to be levied against him, no further proceedings were taken on the rule, which consequently, in the course of the following term (*Hilary* 1853), dropped. The writ of error by the other defendants is still pending.

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THE QUEEN, on the prosecution of THE COMPANY OF PROPRIETORS OF THE GRANTHAM CANAL NAVIGATION *against* THE AMBERGATE, NOTTINGHAM, AND BOSTON, AND EASTERN JUNCTION RAILWAY COMPANY.

MANDAMUS. The writ recited the provisions of “The Ambergate, Nottingham and Boston and Eastern Junction Railway Act, 1846” (9 & 10 *Vict. c. clv.*, local and personal, public.). That Act, reciting, in the usual form, that the making of a railway, therein described, would be for the public benefit and that the promoters were willing to make it, and reciting the Nottingham Canal Act (32 *G. 3. c. 100.*) (a), and the Grantham Navigation Acts (33 *G. 3. c. 94.*) (b) and 37 *Geo. 3. c. 30.* (c)), and that *The Nottingham Canal* capital had not been subscribed for under a contract, pursuant to stat. 8 & 9 *Vict. c. 18. s. 16.*, nor could the defendants then or at any time procure it to be so subscribed for. Plea, by way of estoppel, that defendants had taken the lands of a third party named, on part of the line, in exercise of the compulsory powers. Demurrer. Held, that the return was good, as it shewed that a compliance with the command in the writ, which would necessitate the exercise of the compulsory powers, would be illegal. Held, also, that the plea of estoppel was bad, as the matter disclosed by it was *res inter alios acta*.

(a) “For making and maintaining a navigable canal from the *Cromford* canal, in the county of *Nottingham*, to or near to the town of *Nottingham* and to the river *Trent*, near *Nottingham Trent Bridge*; and also certain collateral cuts therein described, from the said intended canal.”

(b) “For making and maintaining a navigable canal from or nearly from the town of *Grantham*, in the county of *Lincoln*, to the river *Trent*, near *Nottingham Trent Bridge*; and also a collateral cut from the said intended canal, at or near *Cropwell Butler*, to the town of *Bingham*, both in the county of *Nottingham*.”

(c) “For enabling the Company of Proprietors of the *Grantham Canal*

Company and *The Company of Proprietors of the Grantham Canal Navigation* were desirous that the railway should be worked in common with their canals, and that the Canal Companies should be thereafter consolidated with the intended Railway Company, incorporated "The Companies Clauses Consolidation Act, 1845" (8 & 9 *Vict. c. 16.*), "The Lands Clauses Consolidation Act, 1845" (8 & 9 *Vict. c. 18.*), and "The Railways Clauses Consolidation Act, 1845" (8 & 9 *Vict. c. 20.*), so far as consistent with that Act. The Act then incorporated the promoters (the now defendants) for the purpose of making the line, in the usual terms. The writ recited enactments in that Act, that the capital of the Company should be 1,900,000*l.*, and authorizing them to borrow on mortgage 633,000*l.*; that the compulsory powers for the purchase of land were not to be exercised after three years after the passing of the Act; and that the period for completing the works was to be five years; after which period the powers of the Company should not be exercised, except as to so much of the line as should then be completed, and except also as to the said Nottingham and Grantham Canals and all works belonging thereto. The writ then recited further provisions of this Act as follows. "And reciting that the capital of *The Nottingham Canal Company* consists of the sum of 75,000*l.* divided into 500 shares of the original value of 150*l.* each; And that the capital stock of *The Company of Proprietors of the Grantham Canal Navigation*, otherwise

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Navigation to finish and complete the same, and the collateral cut to communicate therewith; and for amending the Act of Parliament, passed in the thirty-third year of His present Majesty, for making and maintaining the said canal and collateral cut."

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called in the now reciting Act *The Grantham Canal Company*, originally consisted of the sum of 75,000*l.* divided into 750 shares of the value of 100*l.* each, which capital was, under the powers of the said Act" (37 *G. 3. c. 30.*), "increased to the sum of 112,500*l.* by the conversion of the said shares into shares of 150*l.* each; And reciting that all calls had been paid upon the shares in the said canal Companies, with the exception of one share in the said *Grantham Canal Company* which had been forfeited for non-payment of calls; and each of the said shares in *The Nottingham Canal Company* was then of the value of 225*l.*, and each of the said shares in *The Grantham Canal Company* was then of the value of 160*l.*: It is enacted that, from and immediately after the opening of the railway between *Ambergate* and *Grantham* for public use, the Company, thereby incorporated, should be liable to pay to the committee of management for the time being of *The Nottingham Canal Company*, for the use of the persons who, at the time of the opening of the railway between *Ambergate* and *Grantham*, should be proprietors of *The Nottingham Canal*, the sum of 225*l.* for and in lieu of each share in *The Nottingham Canal*, and should also be liable to pay to the committee of management, for the time being, of *The Grantham Canal Company*, for the use of the persons who, at the time of the opening of the railway between *Ambergate* and *Grantham*, should be proprietors of *The Grantham Canal*, the sum of 160*l.* for and in lieu of each share (including the said forfeited share) in *The Grantham Canal*. And the Company, thereby incorporated, should, and they were thereby required, to pay the same several sums to the said committee of management, for the time being, respectively, within six

calendar months from the opening of the railway between *Ambergate* and *Grantham* for public use, but without interest in the mean time: and, in the event of the said several sums not being paid within the period and in manner aforesaid, the sums which should remain unpaid should be deemed a debt or debts due from the Company, thereby incorporated, to *The Nottingham Canal Company* and *Grantham Canal Company* respectively, and should be recoverable with interest at 5*l.* per cent. per annum, either in one or in several sums, in any of Her Majesty's Courts of record at *Westminster*. And it was further enacted that, in addition to the said sum of 1,900,000*l.* which the Company were thereinbefore authorized to raise, they might also create such number of additional shares as might be necessary for the purpose of allotting shares in the capital or joint stock of the said Company to the several proprietors of shares in the canal Companies who might have elected, or who might elect, to take such shares, and for the purpose of raising money to pay to the proprietors of shares in the canal Companies, who may not elect to take shares in the capital or joint stock of the Company thereby incorporated, the respective sums of 275*l.* and 160*l.*, for the several shares in the canal Companies, in respect whereof shares in the capital or joint stock of the Company, thereby incorporated, might not have been or might not be taken; and the additional shares so created by the Company should be deemed to be and form part of the capital of the Company. And it was further enacted that, in case you, the said Company, should by the creation of additional shares, as in the now reciting Act before mentioned, increase your capital beyond the sum of 1,900,000*l.* therein before authorized to be

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raised, it should be lawful for you, in every such case, to borrow on mortgage or bond, in addition to the said sum of 633,000*l.*, which you were therein before authorized to borrow, any further sum not exceeding in amount one third part of the said increased capital: Provided nevertheless, that no part of such additional sum should be borrowed as aforesaid, until the shares for raising such increased capital should have been created and issued, and one half part of the capital, to arise therefrom, or to be represented thereby, should have been paid up, either actually, or by allotment of such shares in lieu of paid up shares in the canal Companies: Provided also, that, during such time as any mortgage debt, which might be owing by the said canal Companies at the time of the execution of the said conveyances, should remain owing and unpaid, the amount of such debt should be taken into account as part of the additional sum which the Company thereby incorporated were authorized to borrow as aforesaid, and in satisfaction, to that extent, of the power to borrow the same, as by the now reciting Act, reference being thereto had, will more fully and at large appear." The writ then contained suggestions: that it was duly ordered by a warrant, made under the powers of stat. 11 & 12 *Vict. c. 3.*, that the time for making the line should be extended for two years, and also that the time for the exercise of the compulsory powers for the purchase of lands should be extended for two years: that a portion of the line from *Grantham* so far as a place called *Bulwell*, lying between *Nottingham* and *Ambergate*, was completed, and opened for traffic and used by the defendants: Yet that the execution of the rest of the works necessary for completing the works from *Ambergate* to *Grantham* had been delayed. And

suggestions: that the Company had funds and means of completing the line, but that it could not be done within the time given by the Acts, and by the warrant, unless begun without delay: that *The Company of Proprietors of the Grantham Canal Navigation* had an interest in the completion of the line, because the defendants "would be more liable to pay the said *Company of Proprietors of the Grantham Canal Navigation* within six months from the opening thereof the sum of money specified in the first mentioned Act;" and that *Henry Thompson*, a resident on the proposed line, was also interested: And that application had been made to the defendants to proceed with their works. The writ then commanded the defendants "to complete the said line of railway" in pursuance of their Act.

Return (so far as is material to the points reported): "That we have never been able, and are not able, to procure the whole of the said capital or sum of 1,900,000*L*, in the said writ mentioned, to be subscribed for; and that it has not all been subscribed for, according to the statute in such case made and provided:" and that the total length of the authorized line is 90 miles, whereof the portion between *Ambergate* and *Grantham* is 36½ miles: "and that the undertaking" authorized by the Act "is an undertaking intended to be carried into effect by means of a capital to be subscribed by the several persons and corporations promoters thereof; and that the said sum of 1,900,000*L* was and is the whole of the capital or estimated sum for defraying the expenses of the said undertaking in pursuance of the said Act; and that the said last mentioned sum had not at the teste or coming of the said writ or at any time since been, nor is it now, subscribed under contract binding the parties thereto, or

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any party thereto, their or his heirs," &c., "for payment of the several sums by them respectively subscribed, or otherwise howsoever."

The prosecutors pleaded to this return twenty two pleas. Eighteen of those pleas led to issues of fact. The third, eleventh and fifteenth pleas were specially demurred to, as being argumentative traverses of allegations in parts of the return not above set out.

It is not considered necessary to set out these pleas, which were very voluminous, and involved no point of general importance; and the argument relating to them is omitted.

Plea 12. "That the defendants ought not to be admitted or received to make or plead so much of the said return as alleges that" &c. (the part of the return above set forth), "because the plaintiffs say that" &c. The plea then shewed that the defendants had taken lands from certain persons (named in the plea) who had refused to treat, and had caused the compensation of these persons to be assessed, as if in exercise of the compulsory powers given them by the Act: verification: "wherefore they pray judgment if the defendants ought to be admitted or received, against their said act so by them done as in this plea aforesaid, to make or plead that part, or any portion of that part, of the said return, in the introductory part of this plea mentioned." Demurrer (assigning causes which it is unnecessary to notice). Joinder.

The demurrers were argued in last *Michaelmas* term (a).

Willes, for the defendants. It must for the present

(a) November 20. Before Lord Campbell C. J., Coleridge, Wightman and Erle Js.

be taken that, according to the decision of the majority of this Court in *Regina v. York and North Midland Railway Company (a)*, the writ is good. The part of the return, to which the 12th plea is pleaded, is a good answer. The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18.), s. 16., enacts that, "Where the undertaking is intended to be carried into effect by means of a capital to be subscribed by the promoters of the undertaking, the whole of the capital or estimated sum for defraying the expenses of the undertaking shall be subscribed under contract binding the parties thereto, their heirs, executors, and administrators, for the payment of the several sums by them respectively subscribed, before it shall be lawful to put in force the powers of this or the special Act, or any Act incorporated therewith, in relation to the compulsory taking of land for the purposes of the undertaking." That provision is incorporated with the special Act in the present case. It is therefore unlawful for the defendants to take any lands by compulsion. It is not practicable to make a line without the aid of these powers: and no peremptory mandamus will be issued commanding what is illegal or impossible; *Regina v. London and North Western Railway Company (b)*. Then the 12th plea is, by way of estoppel, that the defendants did exercise their compulsory powers against certain persons named. These persons did not make the objection: if they had, it must have prevailed. Perhaps they may even yet recover the land taken, if they will restore the price. [*Erle J.* referred to *Doe dem. Payne v. The Bristol and Exeter Railway Company (c)*.] However that may be, at most

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(a) Ante, p. 178.

(b) Ante, p. 199, note (a).

(c) 6 M. & W. 320.

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Sir *F. Kelly*, Solicitor General, *contra*. The defendants, after exercising their powers for several years, and making so large a proportion of their line, cannot be permitted to say that they have been acting illegally throughout. The plea shews that in one particular instance they have used their compulsory powers; but the return, stating that the line is open for many miles, shews that they must have done so in many instances. [Lord Campbell C. J. We certainly assumed, in *Regina v. London and North Western Railway Company (a)*, that a railway cannot be made without exercising the compulsory powers. Our doctrine there was that, on mandamus, *Nemo tenetur ad impossibilia*; and that to make a railway after the expiring of the compulsory powers was impossible.]

Willes was heard in reply.

Cur. adv. vult.

Lord CAMPBELL C. J., in this term (*January 27th*), delivered the judgment of the Court.

Assuming the writ of mandamus in this case to be good upon the face of it, we are of opinion that there is a sufficient answer to it in the return, that the whole of the capital or sum of 1,900,000*l.* has not been subscribed for, and that the Company have never been able, and

(a) Ante, p. 199, note (a).

are not able, to procure the whole of the said capital or sum of 1,900,000*l.* to be subscribed for, and that it has not all been subscribed for, according to the statute in such case made and provided, with other allegations to the same effect. This mandamus, in substance, commands the Company to exercise the compulsory powers, conditionally conferred upon them, to purchase land, and thus to make and complete the portion of the line of railway between *Ambergate* and *Buhoell*. They answer, that they are forbidden to exercise these powers by stat. 8 & 9 *Vict. c. 18. s. 16.*, and shew that, without any default on their part, they have never been, and are not, in a situation lawfully to exercise these powers. If so, they are as little able to obey the writ as if, by effluxion of time, their compulsory powers had expired; in which case it has been determined that a mandamus to make and complete a railway ought not to be granted; *Regina v. The London and North Western Railway Company (a)*. The only answer to this part of the return is the 12th plea, which is pleaded by way of estoppel, that the defendants ought not to be admitted to make so much of the return, because the Company had acted under the compulsory clauses in another part of the line, in an instance set out, where an arbitration had taken place in the form prescribed by the statute. But this was *res inter alios acta*, and cannot operate as an estoppel between the prosecutors and the defendants. If a peremptory mandamus were to go, it would order that to be done which is illegal. The landowners, between *Ambergate* and *Buhoell*, might clearly contest the right of the railway Company to give the notices, or

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(a) Ante, p. 199, note (a).

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to take any compulsory proceeding, for the purpose of obtaining the land necessary for making and completing the railway. It has been supposed that landowners might question the title of the Company, under stat. 8 & 9 *Vict. c. 18. s. 16.*, even after the Company have got possession of the land: and there can be no doubt that, till the whole of the capital has been duly subscribed in the manner required, they might treat the notices of the Company requiring the land as nullities. Under these circumstances, we think that there ought to be judgment on the demurrer to the 12th plea for the defendants.

With respect to the demurrers to the 3d, 11th and 15th pleas, pleaded to other parts of the return, we think there ought to be judgment for the prosecutor, as these pleas are under stat. 4 *Ann. c. 16.* and stat. 1 *W. 4. c. 21.*, and as they may be considered pleas in confession and avoidance. But, as the judgment already given is a bar to the prayer for a peremptory mandamus, we do not think it necessary to enter more at length into these pleas: and we give judgment upon them for the prosecutors.

Judgment for the defendants on the 12th plea; for the Crown on the 3d, 11th and 15th pleas (a).

(b) See *Regina v. Great Western Railway Company*, ante, p. 253.

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IN the matter of a plaint, MICHAEL WALSH *Wednesday, January 12th.*
 plaintiff and ALEXANDER CONSTANTINE IONIDES
 defendant.

COWLING, in last *Michaelmas* term, obtained a rule for a prohibition, in the above plaint, against *Joseph Pollock Esq.*, Judge of the County Court of *Lancashire*, holden at *Liverpool*. The case had been before *Crompton J.*, at Chambers, who had referred the matter to the Court. From the affidavits on both sides, the facts appeared to be as follows.

The defendant, *Ionides*, was a merchant resident in *London*, a partner in the firm of *Ionides, Sgouta & Company*. In *December* 1851, the defendant's firm were owners of a cargo of *Indian* corn, on board the ship *Thane of Fife*, which was chartered for a voyage from *Galatz* to *Cork*, for orders to any safe port in the United Kingdom, and which had at that time arrived at *Queens-town, Cork*, and was there waiting orders. The defendant was in communication, by electric telegraph, with Messrs. *Robert Makin & Son*, brokers, at *Liverpool*, concerning

Plaint in the county court of *L.*, by leave of the Judge (under stat. 9 & 10 *Vict.* c. 95. s. 60.), against a defendant not resident in the jurisdiction. The particulars were, for not delivering a cargo of corn bought by plaintiff of defendant by a contract in writing. On a rule for a prohibition, it appeared, by the affidavits, that plaintiff, at *L.* within the jurisdiction, made a contract with a broker, who professed to act for defendant, in these terms:

"Sold the cargo of corn, per *T.*, now at *Q.*, at 27s. per quarter, including cost, freight and insurance, to a safe port in the United Kingdom. Payment, cash in exchange for shipping documents and policy of insurance." *Q.* was out of the jurisdiction; and so was the ship. Plaintiff requested that the ship should be sent to *D.*, a port also out of the jurisdiction. Defendant sold the cargo to another person, delivered him the shipping documents, and caused the cargo to be delivered to him. Held, that the non-delivery of the cargo was a breach of the contract, and a cause of action, but out of the jurisdiction of the county court; and that the rule must be absolute to prohibit proceeding in the plaint for that. But held, that the non-delivery of the shipping documents was also a breach of the contract, and a cause of action within the jurisdiction, and that the rule must be modified so as to allow the plaintiff to proceed for that, if the Judge in his discretion thought fit to amend the particulars.

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the sale of this cargo. He had, according to the case on his behalf, authorized them, if they could obtain an offer within certain limits, to communicate it to him by telegraph; and, if he approved, but not otherwise, to make the contract. Messrs. *Robert Makin & Son*, understanding their authority to be absolute, made and signed, at *Liverpool*, a contract with the plaintiff, who was then in that town. It was dated 2nd *December*, 1851, and addressed "*Michael Walsh, Drogheda*," and was in the following terms. "We have this day sold to you, for ac. of Messrs. *Ionides, Sgouta & Company*, the cargo of *Galatz Indian corn*, per *Thane of Fife*, now at *Queens-town*, consisting of about 920 quarters, at the price of 27s. per quarter, including cost, freight and insurance, to a safe port of the United Kingdom. Payment, cash in exchange for shipping documents and policy of insurance, less interest equal to two months from this date. Commission on freight, if any, to be deducted from invoice. It is understood that, if the cargo is not reported in good condition, the buyer has the option of rejecting it." (Signed) *Robert Makin & Son*. Messrs. *Robert Makin & Son* sent a copy of this contract to the defendant at *London* by post on the same day, and informed him that they had written, at the same time, to *Cork*, directing that the cargo should be examined, and ordering that, if it was reported good, the vessel should be sent to *Drogheda*. The defendant, before he received this letter, had himself made a similar contract, by which he sold the cargo to other persons. He returned the contract note to Messrs. *Makin*, and refused to confirm the orders sent by them to *Cork*, on behalf of the plaintiff, to send the vessel to *Drogheda*. He delivered the shipping documents to the parties with whom he had made

the contract last mentioned; and the vessel was dispatched according to orders of these parties. After this the plaintiff repeatedly applied to Messrs. *Makin & Son*, in *Liverpool*, for the cargo, and also for the shipping documents, but got neither. By leave of the Judge of the County Court, he issued a plaint against the defendant on the 16th *September*, 1852. The following were the particulars delivered. "*December 2*, 1851. To damages sustained by the plaintiff in the defendant not delivering a cargo of *Indian* corn, bought by the plaintiff from the defendant on the 2nd *December*, 1851, by a contract in writing: 46*l.* 0*s.* 0*d.* To plaintiff's expenses in coming from *Drogheda* in *Ireland* to *Liverpool*, to obtain delivery of the above cargo, and, not having succeeded, in the loss of time in finding out another cargo in lieu of the above cargo—3*l.* 10*s.* 0*d.* Total 49*l.* 10*s.* 0*d.*"

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Milward now shewed cause (*a*). The contract was made in *Liverpool* within the jurisdiction of the County Court; the defendant resides in *London* out of the jurisdiction; but the Judge has given leave to sue. This he is authorized to do, by stat. 9 & 10 *Vict. c. 95. s. 60.*, if the cause of action arose within the jurisdiction. Therefore the whole question comes to be, What is the cause of action in this case? The contract is, in effect, for the sale of the shipping documents. As the contract was made in *Liverpool*, and the non-delivery of the documents, which ought to have been delivered, was a breach of it within the jurisdiction, the whole cause of action was within the jurisdiction. [*Crompton J.* That

(*a*) Before Lord Campbell C. J., Coleridge, Wightman and Crompton Js.

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was urged before me at Chambers; and I thought there was great weight in the argument. But the particulars in the plaint are, not for the omission to deliver the shipping documents, but for not delivering the cargo.] Particulars, in such a proceeding as a plaint, ought to be construed liberally; and, if it appear what was the real cause of action intended, a mistake in describing it ought not to hurt. The particulars clearly shew that the plaintiff was suing for a breach of the written contract of 2nd *December*, 1851. Now, on this contract, there was no engagement to deliver the cargo. If the vendor had given the shipping documents, he would have fulfilled his contract, though the master of the ship had wrongfully refused to deliver the cargo. That being so, the particulars, which by misapprehension describe what is not a breach of the contract or a cause of action, must be understood as referring to the real cause of action. If necessary, the Judge in the County Court would amend them.

Cowling, contra. The non-delivery of the cargo is a breach of this contract. The plaintiff has a cause of action for that, which he has accurately described in his particulars. That cause of action accrued out of the jurisdiction of the County Court of *Liverpool*; for the non-delivery was at *Drogheda*, or perhaps at *Queens-town*; the argument on the other side is, that, inasmuch as there was or might have been another cause of action arising in the jurisdiction, the plaintiff is at liberty to say that he meant to give notice of such other cause of action. [Lord *Campbell* C. J. Might not the non-delivery of the shipping documents prove in substance what is described in the particulars, the non-delivery of

the cargo under the contract?] No. The contract is not for a mere sale of the shipping documents. The cargo is the object of the bargain. The shipping documents and policy are merely accessory. They are the ordinary means by which a delivery of the cargo is obtained, or an indemnity, if it is damaged by one of the perils insured against. Had the words of the contract stopped before mentioning the terms of payment, the law would have implied a contract to deliver the cargo; and nothing that follows takes away that implication. The contract proceeds: "Payment, cash in exchange for shipping documents and policy of insurance." That stipulation is for the benefit of the vendor, who thus has prompt payment; it is partly also for the benefit of the purchaser, and may give rise to a contract to deliver the shipping documents and policy of insurance; but it is merely ancillary to the principal subject of the contract, the delivery of the cargo. The master of the ship is not bound to obey the orders of the purchaser to proceed to any particular market. If the original charterer orders him to another market, he is justified in obeying him, though the shipping documents have been parted with; so that, if the cargo is withheld from the purchaser, his possession of the shipping documents would be valueless; and, where the cargo has not sustained injury by a sea peril, the policy also is valueless. Therefore nominal damages only could be recovered on a breach for not delivering the documents: the substantial damages must be recovered on a breach for not delivering the cargo, which is the substantial cause of action, and is the one described in the particulars. [*Crompton J.* There have been many actions brought, when I was at the bar, on the supposi-

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tion that the whole damages might be recovered on the breach for not delivering the shipping documents. Are you right in saying that, supposing the cargo to be withheld by the master, the purchaser would be without remedy against him or the shipowner? Might he not bring trover for the cargo?] Probably he could, as the property in the specific cargo might vest in him by the bargain and sale. But the contract must be construed to be to deliver the shipping documents, and to take the proper steps to procure a delivery at such port within the United Kingdom as the purchaser shall appoint. In the present case, the defendant ordered the vessel to another port for the express purpose of preventing the plaintiff from getting the cargo. This was done before the shipping documents were refused. The question in the cause, on the merits, is, whether he was justified in doing so: but the question now before the Court is, whether, if he was not justified, that ordering of the cargo to another port was a breach of contract and a cause of action. The defendant's position is, that it was; and the subsequent refusal to deliver the documents which, under such circumstances at least, were valueless could be only a breach for which nominal damages would be recovered; and not in substance the cause of action for which the plaint was brought.

Cur. adv. vult.

Lord CAMPBELL C. J., on a subsequent day in this term (13th *January*), delivered the judgment of the Court.

This was an application for a prohibition to the Judge of the County Court of *Liverpool*. And we think the rule ought to be made absolute, but with modifications. The defendant prays for a general prohibition to stay

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all proceedings upon the plaint. We are extremely reluctant to interfere with the jurisdiction of a county court, unless where that jurisdiction is clearly exceeded; and, if it be so, it is our bounden duty to grant a prohibition. In the present case, there is a suit brought in the County Court in respect of a contract, whereby it was agreed that a cargo of corn on board a ship should be sold, and that it should be delivered at any port in the United Kingdom, and that, upon handing over certain shipping documents and the policy of insurance, the price should be paid. In point of fact, the contract was made at *Liverpool*; and at *Liverpool* there was a demand made on the vendor to hand over the shipping documents and policy of insurance. He did not do so; and the action was brought by the purchaser upon that breach of the contract. But, in his particular of demand, he states that he brings the action for the non-delivery of the cargo. This would be a cause of action not arising within the jurisdiction of the County Court of *Liverpool*, because the cargo was ordered to be delivered at *Drogheda*, and might have been ordered to be delivered at any port in the United Kingdom. Nevertheless, under this plaint, it is possible that the plaintiff might proceed for a cause of action within the jurisdiction of the County Court of *Liverpool*, for not having handed over to him the shipping documents with the policy of insurance: the contract was made in *Liverpool*; and that breach of it took place in *Liverpool*: therefore we cannot say that there should be a general prohibition to proceed on the plaint which has been brought in the County Court of *Liverpool*. There are ancient authorities to shew there may be a partial

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prohibition. I remember those authorities being acted on in *Dr. Free's Case* (a), where, in a suit in the Ecclesiastical Court for immoralities, some of which were barred by the Statute of Limitations, 27 Geo. 3. c. 44., and others were not barred, a prohibition was granted in respect to all that were barred by the Statute of Limitations. Now we think the proper course will be to grant the prohibition against proceeding on that part and for that breach which is beyond the jurisdiction of the County Court; and, therefore, we think the rule should be made absolute, prohibiting the plaintiff from proceeding upon the said plaint in respect of the breach of contract mentioned in the particulars to the said plaint annexed: that was for not delivering the cargo. Now this will allow the plaintiff, although he is prohibited from proceeding for that breach of what was contracted for as to the non-delivery of the cargo, still to proceed under this plaint for the breach of contract in not delivering over the shipping documents and policy of insurance at *Liverpool*. He may apply to the Judge of the County Court; and the Judge of the County Court, in his discretion, may allow the particulars to be amended, and restricted to that breach of the contract which took place within the jurisdiction of the County Court. Therefore the rule will be made absolute to that extent.

Rule absolute accordingly.

(a) *Free v. Burgoyne*, 5 B. & C. 400; 6 B. & C. 538.

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JOHN TALLIS *against* FREDERICK TALLIS.

COVENANT. The declaration recited that plaintiff and defendant, "for a long space of time, to wit" &c., "before the making the indenture thereafter mentioned, carried on the trade or business of publishers of books and other publications in copartnership, and, among other parts and branches of the said trade or business, a certain part or branch thereof known and distinguished as the Canvassing Trade; which said part or branch consisted in printing and publishing works and books in different numbers, parts or divisions, some of which works and books consisted of the works of deceased authors in which works copyright had ceased; and employed canvassers or persons to go from house to house to solicit and obtain purchasers and customers for the same. And plaintiff and defendant, during the said period, were engaged in the said Canvassing Trade in and throughout the different cities, towns and places

A declaration in covenant recited that plaintiff and defendant had been partners as publishers of books, and that part of their trade, called the Canvassing Trade, consisted in publishing books in numbers, and employing travellers to sell such books by canvassing for purchasers. By indenture, dissolving the partnership, it was agreed that plaintiff should retain the whole of the partnership stock, and should indemnify defendant against all

liabilities, and pay him a large sum of money. Defendant (*inter alia*) covenanted not directly nor indirectly to be concerned in the Canvassing Trade in *London* or within 150 miles of the General Post Office, nor in *Dublin* or *Edinburgh* or within fifty miles of either, nor in any town in *Great Britain* or *Ireland* in which plaintiff or his successors might at the time have an establishment, or might have had one within the six months preceding. Breaches: that defendant was engaged in the trade within 150 miles of the General Post Office, and also in *Manchester* and *Liverpool*, in which towns plaintiff, at the time of the breaches, had establishments. Pleas, to both sets of breaches: that there were numerous works which plaintiff did not publish, and had no intention of publishing, and that many such might be published with advantage to the public, by defendant, and without injury to plaintiff: that the Canvassing Trade applied to all such books; and that the restraint, as to the Canvassing Trade as applicable to such works, was unreasonable: verification. Demurrer (amongst other grounds), because the plea referred matter of law to the jury.

Held: That the declaration was good, it not appearing that the restraint was unreasonable. Held, also, that the pleas were bad in substance, as the facts disclosed did not shew that the restraint was unreasonable. *Quare* whether, if the facts had so shewn, the pleas would have been bad in form.

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and engagements on their parts thereafter expressed and contained: the plaintiff, amongst other things, thereby covenanted with the defendant that he would pay the said several promissory notes, and also, "on or before the 15th day of *January* in each year, pay to the defendant, his executors, administrators or assigns, interest up to the 31st day of *December* in each and every year thenceforth ensuing for the said balance or sum of 7750*l.*, or such part thereof as from time to time thereafter should remain due and unpaid;" "and that the plaintiff, or his heirs, executors or administrators, would also pay, satisfy and discharge, in exoneration of the said defendant, and his heirs, executors or administrators, the rent or rents then or thereafter to accrue due or payable in respect of the certain leasehold premises therein mentioned, and all debts then owing by, or liabilities already incurred by, them jointly, or either of them, on account of or in relation to or for the purposes of the said copartnership business, and also the aforesaid alleged debt so claimed to be due to the estate of the said *John Tallis* deceased, and consisting of the particulars thereinbefore recited; and that, in case the plaintiff, his executors, administrators or assigns, should associate himself or themselves in partnership with any person or persons for the purpose of carrying on business with or by means of the said joint or copartnership assets, or the assets which might be acquired by him or them in substitution for the same, then the plaintiff, his heirs, executors or administrators, should and would give such incoming partner or partners full notice of the said indenture, and procure such person or persons to assume and adopt in writing the then liabilities of the plaintiff, or his heirs, executors or administrators, to the defendant,

his executors, administrators or assigns, in virtue of those presents and the aforesaid promissory notes and warrant of attorney, at the commencement of any such new partnership. And the said defendant, amongst other things, did, by the said indenture, covenant with and to the plaintiff in manner and words following, that is to say: that he, the said *Frederick Tallis*, should not nor would, at any time or times thereafter, use, exercise or carry on that part of the trade or business of a publisher usually known and distinguished as the Canvassing Trade, or any part, branch or portion of the same, nor be concerned, interested or engaged, directly or indirectly, and either by the employment of capital or the rendering of service, and either in partnership or under any trust, secret or other management, or device whatsoever, in the said Canvassing Trade, within the city of *London* or the counties of *Middlesex* and *Surrey*, or either of them, or within the distance of one hundred and fifty miles from the General Post Office in *London*, or in the cities of *Edinburgh* and *Dublin*, or either of them, or within fifty miles of them or either of them, or in any city, town or place in *Great Britain* or *Ireland* in which he, the said *John Tallis*, his executors or administrators, or his or their successors in the said business, either by himself or themselves, or his or their agent or agents, may, at such time or times, use, carry on or be engaged in the said trade or business of a publisher, or any department, branch or portion thereof, or may, within six months next preceding such time, have so used, carried on or been engaged as aforesaid, or have or be interested in any establishment, warehouse, business or concern for the carrying on of the said Canvassing Trade or business within such place

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or places respectively; As by the said indenture, reference" &c. Averments: That, before and at the time of making the said indenture, and at the several times hereinafter mentioned, it was necessary and reasonable for the protection of the plaintiff in the said trade or business of a publisher that the defendant should not use or exercise that part of the trade or business of a publisher usually known or distinguished as the Canvassing Trade, or any part, branch or portion of the same, nor be concerned, interested or engaged, directly or indirectly, and either by the employment of capital or the rendering of service, and either in partnership or under any trust, secret or other management, or service whatsoever, in the said Canvassing Trade, within the city of *London*, or the counties of *Middlesex* and *Surrey*, or either of them, or within the distance of one hundred and fifty miles from the General Post Office in *London*, or in any city, town or place in *Great Britain* in which he, the plaintiff, his executors or administrators, or his or their successors in the said business, either by himself or themselves, or his or their agent or agents, might use, carry on or be engaged in the said trade or business of a publisher, or any department, branch or portion thereof, or have or be interested in any establishment, warehouse, business or concern for the carrying on of the said Canvassing Trade or business within such place or places respectively. That, although plaintiff hath always, from the time of making the said indenture hitherto, well and truly performed &c. all things on his part to be performed &c., according to the tenor true effect and meaning of the said indenture &c.: The declaration then contained nine breaches for carrying on the trade, directly and indirectly, in *London* and

within one hundred and fifty miles of the General Post Office. Averment that plaintiff had an establishment in *Manchester* and in *Liverpool*, of which defendant had notice (a). The 10th, 11th, 12th, and 13th breaches

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(a) A similar allegation in the declaration, as originally framed, was traversed by the fifteenth plea. The plaintiff demurred to this plea, on the ground that there "was equally a breach of covenant, whether the defendant had notice or not." The defendant took out a summons calling upon the plaintiff to shew cause why the demurrer "should not be set aside as frivolous and irregular, or why the allegation of notice contained in the declaration, and to which the said 15th plea was pleaded, and the said 15th plea, and the demurrer thereto, should not be struck out, the said allegation being immaterial and surplusage to entrap the defendant." The summons was heard before *Pollock* C. B., who dismissed it. In *Easter* term, 1852,

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W. R. Cole obtained a rule, calling on the plaintiff to shew cause as above, and also why the defendant should not be at liberty to sign judgment for want of a replication to the 16th plea, and why a joinder in demurrer, which had taken place since the dismissal of the summons, should not be struck out, and the order of *Pollock* C. B. be rescinded.

It is not a general rule of practice that, where the plea traverses an allegation in the declaration and the plaintiff demurs to the plea, he will be put to his election whether the demurrer shall be set aside as frivolous or the allegation be struck out: though this will be done if the plaintiff's pleading appear to be so framed as to entrap or unfairly perplex the defendant.

So held, before stat. 15 & 16 *Vict.* c. 76.

Downdewell now shewed cause. The argument in support of the rule will be that, if the demurrer be not frivolous, the allegation is unnecessary. But the plaintiff, though he denies that the traverse is material, is not bound to submit to the risk of a demurrer for want of the allegation. Besides, the notice may be important as influencing damages. [*Lord Campbell* C. J. For that purpose, the fact might be proved without being on the record.] Many allegations not traversable may be properly introduced into the declaration, as, for instance, the allegation of notice to the defendant in a declaration against the maker of a promissory note, which is in the form given by the *Regula Generalis* of *Trin. T. 1 W. 4* (2 *B. & Ad.* 783.). Whether the allegation be necessary or not is open to argument; *Vyse v. Wakefield* (6 *M. & W.* 442., affirmed in Exchequer Chamber, 7 *M. & W.* 126.), *Com. Dig. Condition* (L 9.), *ib. Pleader* (C 75.). The defendant is seeking to set aside his own proceedings at the cost of the plaintiff. It is supposed that *Cutts v. Surridge* (9 *Q. B.* 1015.) authorizes this application. But there the Judge at Chambers thought that the pleading was tricky, and the Court would not interfere with his discretion: here the Judge has thought the pleading

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proper; and the Court will, in like manner, abstain from interfering. If the defendant, before pleading, had applied to have the allegation struck out, the plaintiff at least might have obtained terms, such as an undertaking not to bring error. It may be questioned whether the Judge or the Court has any power to strike out the allegation: the *Regula Generalis* of Trin. T. 1 W. 4. (2 B. & Ad. 783) is clearly inapplicable.

W. R. Cole, contra. *Cutts v. Surridge* (9 Q. B. 1015.) cannot be distinguished from this case. The principle of that decision was that where an allegation is immaterial it may be struck out, and where it is material a demurrer to a traverse of it is frivolous. [*Wightman J.* Why did you traverse?] Because it rather appears that the allegation is material: if the plaintiff thinks so, he should join issue, and not demur.

Lord CAMPBELL C. J. This rule must be discharged. We cannot make it absolute unless it was imperative on the Lord Chief Baron to make the order for striking out either the allegation or the demurrer. I cannot think there is such an universal rule. In *Cutts v. Surridge* (9 Q. B. 1015.) it was thought that the plaintiff's course had not been fair and bona fide. But we see no reason for thinking so in this case: there is nothing like subtlety of pleading. The allegation might be, and I think was, immaterial: but it was not introduced for any dishonest purpose. We are called on to set aside the demurrer as frivolous: I incline to think that it is good, and that the traverse is bad, the want of notice being immaterial. As to the other alternative, the striking out of the allegation, I do not think that in this state of things we should be justified in making the order. The defendant is not entitled to ask this after taking the traverse, to say nothing of his having joined in demurrer. I mean to lay down no general rule: the matter is in the discretion of the Judge. I do not say that, if the Lord Chief Baron had made such an order here as was made in *Cutts v. Surridge*, I should have thought the order ought to be set aside. But he thought that no such order should be made: I cannot say that he was wrong, and therefore cannot set aside his order.

WIGHTMAN J. This is an application to the summary jurisdiction of the Court, to prevent the plaintiff from taking a step which by the ordinary rules of law he is entitled to take. The Court no doubt will interfere when it is perfectly clear that a party is attempting to take an unfair advantage. In *Cutts v. Surridge* it was thought that the plaintiff was attempting to

Plea 16. To the first nine breaches, "except so far as the same respectively relate to anything done, or alleged or supposed to have been done, by defendant

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entrap the defendant: but every thing turns on the particular case. Here it would be difficult to make the rule absolute without contradicting Mr. Cole's view that the traverse may be material: the Court must be perfectly satisfied that it is immaterial, before striking it out. I myself incline to think, with my Lord, that it is immaterial. But we cannot interfere without being satisfied that the Lord Chief Baron, on all the facts before him, was wrong. In *Cutts v. Surridge* (9 Q. B. 1015.) we supported the view taken by the Judge at Chambers.

(ERLE J. was absent.)

CROMPTON J. I quite agree. If *Cutts v. Surridge* is to be understood as laying down the general rule that, when an allegation is traversed and the traverse demurred to, either the demurrer is to be set aside as frivolous or the allegation is to be struck out, I should not agree with the decision. I do not agree with the reasons assigned for it; and I think the practice suggested would be wrong. The demurrer here appears to me to be good: but, on the other hand, can we at this stage say that the allegation is to be struck out? I am not aware that such a course has ever been taken except where the pleading has been scandalous or prolix. It would be very dangerous if we were to oblige a party to alter his declaration under terror of having his demurrer held frivolous. There may be a writ of error. It seems to have been assumed that the Judge at Nisi prius would treat the allegation as admitted if it was not traversed: but the consequence does not follow.

LORD CAMPBELL C. J. The ordinary practice is that a rule to set aside a Judge's order must, if discharged, be discharged with costs. But *Cutts v. Surridge* so nearly resembles the present case, that we give no costs.

Rule discharged, without costs.

The demurrer was argued in Trinity term (May 28th) 1852, before Lord Campbell C. J., Coleridge, Erle and Crompton Js., by *Hugh Hill* for the plaintiff and *Branswell* for the defendant: when, the Court having pointed out that the declaration, as then framed, did not accurately meet the plaintiff's case, *Hill* elected to amend; and the declaration was remodelled as it appears in the text.

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within the city of *London* and the counties of *Middlesex* and *Surrey*, or any or either of them: That, before and during the copartnership, and also and before and at the time of the date and making of the indenture, an immense number, to wit 500,000, works of divers authors (before the respective times aforesaid deceased) had been printed and published in *England*, the copyright in which said works respectively had ceased before and at the respective times above mentioned. That only a very small number of the works above mentioned, in which the copyright had ceased as aforesaid, to wit ten and no more, were printed and published, or reprinted and published, by or on behalf of the said copartnership, or of the plaintiff and defendant, or either of them, before the date and making of the indenture. That, at the time of the date and making of the indenture, it was not likely or probable, nor was there any intention on the part of the plaintiff, that the plaintiff, his executors or administrators, and his and their assigns and successors in the said trade or business, all or any or either of them, would or should, at any time or times thereafter, either alone or jointly with any other person or persons, print or reprint and publish the residue of the works above mentioned, in which the copyright had ceased as aforesaid, or any or either of them, save and except only a very small number, to wit ten. That a large number and proportion of the said residue of the said works, other than and beside what there was any intention or likelihood or probability of being printed or reprinted and published as last aforesaid, to wit one thousand thereof, might have been printed or reprinted and published by defendant with great advantage and benefit to the public and to the subjects and inhabitants of this

kingdom, but for the covenant of defendant in the declaration mentioned. That the Canvassing Trade, mentioned in the covenant of defendant, extends and applies to all works and books, whether the author be living or dead, published, by any person or persons whomsoever, in different numbers, parts or divisions, and sold by canvassers or persons employed to go from house to house to solicit and obtain purchasers and customers for the same. That, before and during the copartnership, and at the time of the date and making of the indenture, there were and still are a large number of cities, towns and places, to wit &c., situate and being out of the city of *London* and the counties of *Middlesex* and *Surrey* and each of them, but within the distance of one hundred and fifty miles from the General Post Office in *London*, within which said cities, towns and places, respectively, the said copartnership had not, nor had the plaintiff and defendant, or either of them, at any time before the date or making of the indenture, used and exercised, or carried on, by themselves or himself, or their or his agents or agent, the trade or business of a publisher, or any department, branch or portion thereof, or the said Canvassing Trade, or any part thereof, or had any depôt or other place for all or any or either of the purposes aforesaid. That, at the time of the making of the said indenture, or at any time afterwards, it was not reasonably necessary for the protection of the plaintiff, in the said trade or business in the declaration mentioned, that the defendant should not at any time, during the remainder of his life, use, exercise or carry on that part of the trade or business of a publisher usually known or distinguished as the Canvassing Trade, with respect to

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such of the said works firstly above mentioned, in which the copyright had ceased as aforesaid, as had not then or theretofore, to wit at any of the times aforesaid, been printed or reprinted and published by plaintiff, either alone or jointly with defendant or any other person or persons, and with respect to which there never was nor is any intention or likelihood or probability that plaintiff, his executors or administrators, or his or their assigns or successors in the said trade or business, or any or either of them, ever would or will print or reprint and publish, either alone or jointly with any other person or persons, or with respect to the works of living authors never printed, published or sold in the way of the Canvassing Trade, or intended to be printed, published or sold in the way of the Canvassing Trade, by the plaintiff, his executors or administrators, or his or their assigns or successors in the said trade or business or any or either of them, alone or jointly with any other person or persons, or with respect to the said cities, towns and places respectively above mentioned. Wherefore the covenant of the defendant, in the declaration mentioned, so far as it applies or relates to the respective causes of action in the introductory part of this plea mentioned, and to which this plea is pleaded, was and is void in law. Verification.

There was a similar plea to the 10th, 11th, 12th and 13th breaches.

Demurrer to each plea, assigning as cause (amongst others) that the pleas referred a question of law to the jury. Joinder in demurrer.

The case was argued in last *Michaelmas* term (a).

(a) November 12th and 16th, 1852. Before Lord Campbell C. J., Coleridge, Wightman and Erle Js.

Dowdeswell, for the plaintiff. The pleas are bad both in substance and in form; and the declaration is good. A covenant, for good consideration, is not void as being in restraint of trade, unless the restraint appears to be greater than the protection of the covenantee can reasonably require. *Mitchel v. Reynolds* (a) is the leading case on the subject; and in the notes to that case in the second edition of *Smith's Leading Cases* all the authorities are collected. In *Hitchcock v. Coker* (b) Tindal C. J., in delivering the judgment of the Exchequer Chamber, says: "We agree in the general principle adopted by the Court, that, where the restraint of a party from carrying on a trade is longer and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered unreasonable in law, and the contract which would enforce it must be therefore void." In the present case the nature of the trade was such as to make the restraint necessary for its protection extensive. It is a trade which from its nature is carried on by agents, so as to be exercised over extensive limits; and thus a restraint even over the whole kingdom might be good; *Whittaker v. Howe* (c). Further: the question, whether the restraint is unreasonable, is for the Court; and the pleas are bad in form, as seeking to refer that to a jury. [Lord Campbell C. J. In equity, where the same person is judge both of fact and law, he can decide whether the restraint is or is not reasonable. But it is very difficult to decide, as a matter of law upon the record, whether the restraint

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(a) 1 P. Wms. 181; S. C. 1 *Smith's Leading Cases*, 171.

(b) 6 A. & E. 446, overruling the judgment of Q. B. in *Hitchcock v. Coker*, 6 A. & E. 438.

(c) 3 Beav. 383.

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in a particular case is or is not reasonable.] *Mallan v. May* (a) is an express authority on the point. There *Parke* B., in delivering the judgment of the Court, says: "We need hardly add, that the latter part of the seventh plea, which is pleaded to that breach, is bad, for the cause assigned for special demurrer. It attempts to leave matter of law, viz. the reasonableness or unreasonableness of the contract, to the jury. This is clearly a question of law, and was decided as such in *Davis v. Mason* (b), *Horner v. Graves* (c), *Proctor v. Sargent* (d), and *Chesman v. Nainby* (e)." [Erle J. The authorities, before *Hitchcock v. Coker* (g), apparently treat both the reasonableness of the restraint and the adequacy of the consideration as questions of law for the Court. Lord Abinger expressed an opposite view: and in *Hitchcock v. Coker* (g) it was decided that the Court was not to consider the adequacy of the consideration. It always seemed to me a difficulty, that, if the Court is to decide what restraint is reasonable, we must judicially determine a question, the solution of which may require knowledge both of the statistics of the trade, and of the geographical situation of places. Lord Campbell C. J. If it were *res integra*, I do not see the objection to casting on the defendant the burthen of pleading and proving, as a fact, that the restraint was more than was reasonable.] Even if it were open to the defendants so to plead, these pleas are bad in substance. Supposing all that is averred to be true, the protection of the trade purchased by the plaintiff requires the

(a) 11 M. & W. 653. 668.

(c) 7 Bing. 735.

(e) 2 Stra. 739; 2 Ld. Raym. 1456.

(g) 6 A. & E. 438.

(b) 5 T. R. 118.

(d) 2 M. & G. 20.

restraint. It is not necessary, in these cases, to shew that the party insisting on the restriction would have been able to furnish a supply of the article for all the space to which the restriction extends: it is enough if he might. In *Mallan v. May* (a) the Court say: "We conceive that it would be better to lay down such a limit as, under any circumstances, would be sufficient protection to the interest of the contracting party, and if the limit stipulated for does not exceed that, to pronounce the contract to be valid." In the case there, that of a dentist, many circumstances which he could not anticipate might arise, making a larger protection necessary. An attorney ought not to act both for vendor and vendee; *Sugd. Vend. & P.* 8: (11th ed.): yet the two may reside within limits not thought too large for a restriction prohibiting another attorney from practising. A surgeon and apothecary cannot possibly, in a populous district, supply all parties residing within a circle of seven miles' radius; yet this distance is not held unreasonable for the restriction; *Sainter v. Ferguson* (b). The same remark applies to the radius of five miles in *Middlesex*, held not to be unreasonable in the case of a milk-man; *Proctor v. Sargent* (c). It may well be that, in a case like the present, one party may be willing to sell, and the other party to purchase, so much of a trade as depends on a particular kind of publicity; yet both may agree that the vendor shall continue his private trade. In *The Master, &c. of the Silk Throusters v. Fremantee* (d), mentioned in the judgment in *Mitchel v. Reynolds* (e),

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(a) 11 M. & W. 667.

(b) 7 Com. B. 716.

(c) 2 M. & G. 20.

(d) 2 Keb. 309.

(e) 1 P. Wms. 185.

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the by-law imposing the restraint was held to be good upon the supposition that the reason given for it was true. *Wickens v. Evans* (a) is a very strong case: there a contract was upheld which directly stipulated for a combination to check the competition of strangers. In *Chesman v. Nainby* (b) the restriction extended to half a mile of the party's then house or of any house to which she, her executors or administrators, might remove. *Archer v. Marsh* (c) also is a strong authority for the plaintiff. There was no limitation as to space in the contracts upheld in *Gale v. Reed* (d) and *Rannie v. Irvine* (e). It is not necessary, in the present case, to inquire into the reasonableness of the whole contract; the stipulations on which the breaches are assigned are alone material; this appears to have been the opinion of the Court in *Wallis v. Day* (g); and the decision in *Nicholls v. Stretton* (h) is to the same effect. And, as to the particular breaches here, it is clear that the restraint is reasonable. In *Bryson v. Whitehead* (i), on the sale of a secret relating to a particular trade, an unlimited restraint upon the use of the secret was held good, though, if the restraint against carrying on the general trade anywhere within the whole kingdom had been insisted on, it would not have been enforced. Further, even supposing this to be a question of fact, the averment in the declaration, that the restriction was necessary and reasonable for the protection of the plaintiff, is not traversed.

W. R. Cole, contra. The declaration cannot be

(a) 3 Y. & J. 318.

(b) 2 Str. 739.

(c) 6 A. & E. 959.

(d) 8 East, 80.

(e) 7 M. & G. 969.

(g) 2 M. & W. 273.

(h) 10 Q. B. 346. See *Price v. Green*, 16 M. & W. 346, in Exch. Ch., affirming the judgment of Exch. in *Green v. Price*, 13 M. & W. 695.

(i) 1 Sim. & S. 74.

taken as alleging that the plaintiff carried on business throughout the kingdom. It is true that the Court will not discuss the adequacy of the consideration: but, that being so, the plaintiff cannot rely upon the largeness of the sum paid by him. The covenant of the defendant may be divided into six heads: the third is a stipulation that the defendant will not carry on the business within one hundred and fifty miles of the General Post Office in *London*; the sixth is a stipulation that he will not carry on the business in any city, town or place in *Great Britain* or *Ireland* in which the plaintiff, his executors or administrators, or his or their successors in the business, may at the time carry on the trade, or may have carried it on within the six months preceding. It will be sufficient to apply the objection to the third and sixth head. As to the third head. Plea 16, after excepting (as was necessary in conformity with *Price v. Green* (a)) so much of the first nine breaches as relates to any thing done in *London, Middlesex* or *Surrey*, states that there are within the one hundred and fifty miles towns in which the copartnership had not carried on business. *Mallan v. May* (b) may be fairly taken as shewing that the question of the reasonableness of the restriction is one of law: the defendant therefore could not safely have traversed that averment in the count. But the objection is on the record. A restriction affecting a distance of more than ten miles has not been held good, in any authoritative decision, except where the restriction has been qualified as to the subject matter. In *Bunn v. Guy* (c) the restriction in effect applied

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(a) 16 M. & W. 346, in Exch. Ch., affirming the judgment of Exch. in *Green v. Price*, 13 M. & W. 695.

(b) 11 M. & W. 653.

(c) 4 East, 190.

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only to the clients of the contracting party; the distance (one hundred and fifty miles) was not adverted to at all. *Whittaker v. Howe* (a) cannot be considered an authority. It is inconsistent with *Ward v. Byrne* (b): and it appears to have been twice questioned by *Patteson J.* during the argument in *Nicholls v. Stretton* (c): it is questioned also, by the editors, in the note in 1 *Smith's Leading Cases*, 182 a (3d ed.). *Wickens v. Evans* (d) was cited in *Ward v. Byrne* (b), and must be considered as overruled by that case, with which it cannot be reconciled. In *Bryson v. Whitehead* (e) there was, as *Parke B.* points out in *Ward v. Byrne* (g), a limit of space introduced into the agreement by the consent of the parties. In *Gale v. Reed* (h) the contract, as interpreted by the Court, related only to such friends of the covenantor as the covenantee should choose to trust. In *Rannie v. Irvine* (i) the agreement related only to the distance of a mile and to the then customers: and there the Court seemed to consider that the restriction would have been bad if it must have been understood as applying to a great distance. In *Price v. Green* (k) it was couceded that the restriction for the distance of 600 miles was unreasonable and void. In *Horner v. Graves* (l) a restriction extending to a distance of one hundred miles from *York* was held unreasonable in the case of a dentist: but in *Sainter v. Ferguson* (m) a restriction, in the case of a surgeon and apothecary, extending to the distance

(a) 3 *Beav.* 383.(b) 5 *M. & W.* 548.(c) 10 *Q. B.* 353.(d) 3 *Y. & J.* 318.(e) 1 *Sim. & S.* 74.(g) 5 *M. & W.* 557.(h) 8 *East*, 80.(i) 7 *M. & G.* 969.(k) 16 *M. & W.* 346, in *Exch. Ch.*, affirming the judgment of *Exch.* in *Green v. Price*, 13 *M. & W.* 695.(l) 7 *Bing.* 735.(m) 7 *Com. B.* 716.

of seven miles from *Macclesfield*, was held valid. In that case *Williams J.* said: "It lies upon the plaintiff, who seeks to enforce the agreement, to shew that it is not an unreasonable restraint of trade." The restriction which was upheld in *Hitchcock v. Coker* (a), the case of a druggist, was for a distance of three miles from *Taunton*: in *Proctor v. Sargent* (b), the case of a cowkeeper and milk-man, the restriction was for a distance of five miles from *Northampton Square* in *Middlesex*; and this was supported: in *Pemberton v. Vaughan* (c), the case of a maker and seller of ginger beer, the restriction, which was enforced, was for a distance of a mile from the house of trade. In *Nicholls v. Stretton* (d) the restriction was unlimited as to space: and it was considered to be good as to present and past clients but bad as to future ones. *Mallan v. May* (e) was the case of a dentist: and it was there held that a restriction was bad which extended to all towns where the plaintiff had practised before the expiration of defendant's service under him, some of them appearing by the plea to be one hundred and fifty miles from others. As to the stipulation under the sixth head. This is bad, according to *Nicholls v. Stretton* (d), inasmuch as it is unlimited as to space, and extends to all towns in which the plaintiff, or his successors, may hereafter carry on business. The plaintiff, if this contract were upheld, might at any time stop the defendant from carrying on the business in any town, by simply sending an agent thither. This is clearly more than can be necessary for the protection of the plaintiff. Further, the stipulations under both the third

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(a) 6 A. & E. 438, in Exch. Ch., reversing the judgment of K. B.

(b) 2 M. & G. 20.

(c) 10 Q. B. 87.

(d) 10 Q. B. 346.

(e) 11 M. & W. 653.

1858. and sixth heads are bad, as comprehending all works
which may be hereafter published.

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Dowdeswell replied.

Cur. adv. vult.

Lord CAMPBELL C. J., in this term (*January 12th*), delivered the judgment of the Court.

In this case the principal question is, whether the covenant of the defendant, restricting him from carrying on the business of a canvassing publisher either in *London* or within one hundred and fifty miles from the General Post Office, or in *Liverpool* or *Manchester* (these being the places in respect of which breaches are assigned), is void on the ground of being an illegal restraint of trade. The law relating to contracts in restraint of trade has been altered by late decisions. For many years the contract was void unless the consideration was adequate to the restriction. According to *Parker* C. J. in *Mitchel v. Reynolds* (a), the Court was to see that it was made upon a good and adequate consideration so as to be a proper and useful contract. But in *Hitchcock v. Coker* (b) it was held that the Court had no judicial perception of the ratio of the consideration to the restriction; and that, if there was a legal consideration of value, the contract ought to be enforced without reference to the quantum of that value. Also in *Mitchel v. Reynolds* (c) it is said: "wherever such contract *stat indifferenter*, and for aught appears, may be either good or bad, the law presumes it *primâ facie* to be bad." But, according to the tenor of the later

(a) 1 P. Wms. 181.

(b) 6 A. & E. 438.

(c) 1 P. Wms. 192.

decisions, the contract is valid unless some restriction is imposed beyond what the interest of the plaintiff requires; and his interest has been considered to extend very widely. In respect of time, the restriction may be unlimited, according to *Hitchcock v. Coker* (a): and, though, in respect of space, there must be some limit, yet contracts have been supported where the area of exclusion was apparently greater than the area of the plaintiff's practice. In *Horner v. Graves* (b), where the area of exclusion from practice as a dentist was a circle round *York* of the diameter of two hundred miles, in giving judgment that this was an unnecessary restriction, it is laid down: "unless the case was such that the restraint was plainly and obviously unnecessary, the Court would not feel itself justified in interfering." And in *Mallan v. May* (c), where exclusion from the practice of a dentist in *London*, although containing above a million of inhabitants, was held to be reasonable and valid, the Court says: "it would be better to lay down such a limit as, under any circumstances, would be sufficient protection to the interest of the contracting party, and if the limit stipulated for does not exceed that, to pronounce the contract to be valid." Applying these principles to the present case, and considering that the plaintiff's business, to which the covenant relates, is the diffusion of books published by him in the manner alleged, and thus is almost unconnected with any particular locality, we cannot find that the exclusion of the defendant from *London*, and from one hundred and fifty miles round the General Post Office, and from *Liverpool* and *Manchester*, was unreasonable: and we are

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(a) 6 A. & E. 438.

(b) 7 Bing. 744.

(c) 11 M. & W. 667.

1853. therefore of opinion that the plaintiff had a good cause
of action in the breaches of contract which he has
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We have limited our judgment to the parts of the contract to which these breaches relate, because, if these are valid, the invalidity of other parts of the contract is immaterial; *Mallan v. May* (a). But, by so doing, we do not intend to suggest doubts about the validity of the other parts of the contract not now under judgment.

The question raised by the demurrer to the pleas remains to be decided. And, even if the facts therein stated are taken to be admitted by the demurrer, and that the reasonableness of the restriction in question is to be considered with reference to those facts together with the facts alleged in the declaration, still we think the pleas bad. For, although the books capable of republication may be almost infinite, still the number of subscribers to such republications coming out in numbers is limited: and, although, if the defendant's books are excluded, it does not follow that the plaintiff's books would be purchased, still we cannot ascertain that the number of subscribers to the plaintiff's books would not be diminished if the defendant competed with him by offering other books, especially if they were of a similar character. And, unless the defendant made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion, or that the public interest would be sacrificed if the defendant's intended publications are excluded, according to the general rule before referred to, we ought not to hold the contract

(a) 11 M. & W. 653.

void. The facts of the case are strong to shew that the general rule may be well applied in respect of the present defence. The defendant, as retiring partner, was probably acquainted with the business to which the covenant relates. He stipulated for and obtained a large price for consenting to the restriction: and, as far as we can perceive, he is endeavouring to keep that price without making the return for which it was paid; and he is attempting to support this proceeding on the ground that the public interest would be sacrificed if his publications are not brought out. It is clear there would be evil if the law justified such a breach of contract: but it is by no means clear there would be any compensating good to the public from the publications intended by the defendant to be so made in violation of his promise to the plaintiff.

As we have come to the conclusion that the pleas are bad though the facts stated therein are assumed to be true, it is not necessary to consider the further objection to them on account of referring to a jury the reasonableness of the restriction, which in *Mallan v. May* (a) was decided to be matter of law for the Court. We agree that the question, whether the contract is void as contrary to public policy, is for the Judge, when the circumstances raising the question are conceded. Yet, if the plaintiff may by averment of circumstances not appearing on the contract maintain the affirmative of the restriction being reasonable (which has been mentioned in some judgments on this point), it seems to follow that the defendant ought to have the corresponding right, by averment of other circumstances, of main-

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taining the negative of the same proposition: so that pleas upon the principle of those demurred to ought to be allowed. However, as we think that these pleas, if allowed, do not constitute a defence, the point of form need not be further adverted to.

Judgment for plaintiff.

Wednesday,
January 12th.

In the Matter of JOHN SMITH.

A rule to strike an attorney off the rolls of this Court was granted on an affidavit verifying a copy of an order of the Lord Chancellor striking him off the rolls in Chancery. The rule was enlarged to await the result of a petition to the Lord Chancellor to restore him. In the result, the Lord Chancellor restored him, but debarred him from practising in Chancery for six months. The rule in this Court was discharged on payment of costs.

IN last *Trinity* term, *J. P. Wilde* obtained a rule calling upon *John Smith*, an attorney of this Court, to shew cause why he should not be struck off the roll. The rule was obtained on an affidavit verifying an order of the Lord Chancellor striking him off the roll in Chancery. The rule was enlarged, to wait the result of a petition to the Lord Chancellor.

Gray now informed the Court that the result of the petition was, that the Lord Chancellor had restored Mr. *Smith*, but debarred him from practising for six months; and he moved that the rule be discharged.

J. P. Wilde, contra. The rule should be made absolute to the same extent as the Lord Chancellor's order, that is, it should debar him from practising in this Court for six months.

Lord CAMPBELL C. J. The rule was properly granted on an order of the Lord Chancellor striking the attorney off the rolls of the Court of Chancery; for that shewed

that the Lord Chancellor had decided that he was not fit to be a solicitor: and, if not fit to be a solicitor in that Court, he is not fit to be an attorney in this Court. We give credence to the Lord Chancellor's decision. But now the Chancellor has decided that *Smith* is fit to practise as a solicitor in Chancery, but that still he deserves, as a punishment, to be debarred from so practising in Chancery for six months. If we were to inflict a further penalty by debarring him from practising as an attorney in this Court, we might frustrate the intentions of the Lord Chancellor; for there is nothing to shew that the Chancellor did not think the punishment which he inflicted an ample one for the offence. But, as the application to strike the attorney off our rolls was proper under the then circumstances, the rule must be discharged on payment of costs.

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 Re
SMITH.

COLERIDGE, WIGHTMAN and CROMPTON Js. concurred.

Rule discharged on payment of costs.

JOHNSON *against* GIBSON.

Thursday,
January 13th.

DEBT. The declaration stated that, to wit on 8th *August* 1836, by indenture between plaintiff of one part and *Ann Keeble* of the other, plaintiff demised and leased a messuage to *A. Keeble*, her executors, administrators and assigns, for twenty one years from 12th *August* 1836, at a yearly rent of 30*l.*, payable quarterly on 25th *March*, 24th *June*, 29th *September*, and 25th *December*: and *A. K.*, for herself, her heirs, executors, administrators and assigns, covenanted with plaintiff, his heirs and

Where a declaration in debt for rent states that the rent became and was due, to wit on a day named, being a quarter day, for so many quarters "then elapsed," plaintiff, on an issue upon *Nunquam indebitatus*, must shew that rent

accrued in respect of the quarters ending on that day, and cannot insist upon rent accruing for earlier quarters.

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assigns, to pay the rent. That *A. K.*, to wit on 12th *August* 1836, entered and became possessed for the term. That, after the making of the indenture and during the term, to wit 9th *May* 1850, all the estate, right, title, interest and term of years, then to come and unexpired, property, profit, claim and demand whatsoever, of *A. K.* of and in the demised premises, by assignment thereof then made, legally came to and vested in defendant. And, although plaintiff hath always &c. (general performance by plaintiff), that, after the making of the indenture, and during the term, and after defendant became such assignee, "and while he continued such assignee, to wit on the 25th day of *March* A. D. 1852, a large sum of money, to wit the sum of 22*l.* 10*s.*, being the sum above demanded, and being parcel of 30*l.* of the rent aforesaid, for three quarters of a year of the said term, then elapsed, became and was, and still is, in arrear and unpaid to the plaintiff," contrary to the tenor of the indenture.

There were no particulars of demand.

Plea. As to the causes of action in the declaration, except as to 7*l.* 10*s.*, "parcel of the sum above demanded, and the causes of action in respect thereof," that defendant "never was indebted in manner and form as in the said declaration is alleged:" conclusion to the country. Issue thereon.

Payment of 7*l.* 10*s.*, parcel as aforesaid, into Court, and also of 1*s.*; and averment that defendant never was indebted in a greater amount than the 7*l.* 10*s.*, and that plaintiff had not sustained damages to a greater amount than 1*s.* Which plaintiff took out of Court, and accepted in satisfaction as to so much.

On the trial, before *Jervis* C. J., at the *Hertfordshire* Summer Assizes 1852, it appeared that the defendant

had become assignee, as alleged in the declaration, having entered into possession on the death of his father, who had been assignee of the term. Defendant and his brother were coexecutors of the father. On or before 29th *September* 1851, defendant had quitted possession, and delivered up the lease and assignments to his brother (the coexecutor), to whom the father had bequeathed the term, and who had demanded possession from defendant. The rent up to and including 24th *June* 1851 had been paid by defendant to plaintiff before the commencement of the action: and the payment into Court covered the rent up to and including 29th *September* 1851. Upon these facts the defendant's counsel contended that he was entitled to a verdict, on the ground that the claim was confined to the three quarters ending 25 *March* 1852, and that nothing was due in respect of these quarters. The plaintiff's counsel contended that the claim was not limited, by the declaration, to those quarters; and that, as there was no plea of payment, except as to 7*l.* 10*s.*, the plaintiff was entitled to recover for any two quarters, other than that to which the payment into Court might be referred, during which the defendant had occupied as assignee. It appeared that in fact the defendant had held the premises as assignee for more than two quarters out of the time ending at 24th *June* 1851. The Lord Chief Justice directed a verdict for the plaintiff for 15*l.*, the rent for two quarters, beyond the 7*l.* 10*s.* paid into Court, reserving leave to move to enter a verdict for the defendant.

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In *Michaelmas* term, 1852, *Bovill* obtained a rule accordingly.

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H. Hawkins now shewed cause. It is true that the plaintiff cannot demand the rent for all the three quarters ending on the day named in the declaration, the defendant not having been assignee during the last two, namely those ending respectively at 25th *December* 1851 and 25th *March* 1852. And the payment into Court may be applied, perhaps, to the quarter ending 29th *September* 1851. But it was proved that the defendant held as assignee for several quarters before that last mentioned: and no payment in respect of these is pleaded. [*Wightman J.* But are you not tied down, by the word "then," to the time which you have named as that for which the rent was due? In *Gilbert on Debt* (a) it is said that in debt for rent the plaintiff must set forth at what day or feast the rent became due. Lord *Campbell* C. J. If, under that rule, the time named is material, you will not be aided by the "to wit."] That would not aid: but the question is whether, in the sense necessary to the objection, the time is material. Suppose rent was due for so many quarters ending at *Christmas*: will the plaintiff fail if he has named the last day wrongly, and has described the rent as due at a later day? In fact the allegation is literally true: all the preceding quarters had "then," that is on 25th *March* 1852, elapsed: to satisfy this it is not necessary that the quarters should not have elapsed earlier.

Bovill, *contrà*, was stopped by the Court.

Lord CAMPBELL C. J. This rule must be made absolute. It is argued that, under the plea of *Nunquam*

indebitatus modo et formà, the defendant cannot set up the payment of the rent for quarters earlier than those named in the declaration. But the declaration states that the money became due, to wit on 25th *March* 1852, for three quarters of a year then elapsed; and that allegation of time was necessary, according to *Gilbert's* authority, referred to by my brother *Wightman*. The time therefore was as material as the day of the demise in ejectment. Therefore the plea of Never indebted in manner and form puts in issue the liability as assignee during the time named: and it was not necessary to plead payment as to earlier quarters; for the rent in respect of those quarters is not claimed in this action.

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COLERIDGE, WIGHTMAN and ERLE J^s. concurred.

Rule absolute.

DOE on the demise of NATHANIEL LEWIS BUTT *Friday,*
January 14th.
against GEORGE ROUS.

EJECTMENT, for tolls, turnpikes, tollhouses, toll-gates, bars, chains and buildings. The demise was dated on 13th *April* 1852; and the declaration on the 14th *April* 1852.

Ejectment, by a mortgagee of turnpike tolls &c., brought under stat. 3 G. 4. c. 126. s. 49., to recover possession of

the tollgates &c. After the commencement of the ejectment, another ejectment on the demise (laid earlier than that in the first action) of another mortgagee was commenced. Judgment went by default in the second ejectment; and before the trial the sheriff gave the lessor of the plaintiff in the second ejectment possession under a writ of habere facias possessionem. Held, that the lessor of the plaintiff, who had commenced his ejectment first, was entitled to the verdict. *Quære*, Whether he would be entitled to issue a writ to obtain possession.

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On the trial, before *Martin B.*, at the *Wiltshire* Summer Assizes 1852, it appeared that the lessor of the plaintiff was a mortgagee of the tolls of the Black Dog Turnpike Trust, in *Wiltshire*, and that the ejectment was brought by him under the provisions of the General Turnpike Act (3 *G. 4. c. 126.*), *s. 49.*, the defendant being one of the trustees of that Trust. The defendant relied on an ejectment brought by him, on his own demise, as a mortgagee of the same tolls. The day of the demise, in the ejectment on the demise of *Rous*, was 8th *April* 1852, prior to the day of the demise in the present ejectment on the demise of *Butt*, which was 13th *April* 1852: but the action of ejectment on the demise of *Rous* was not commenced till 28th *June* 1852, after the ejectment on the demise of *Butt* had been brought. Judgment in the ejectment on the demise of *Rous* was suffered to go by default; and the sheriff, on 2nd *July* 1852, gave *Rous* possession under a writ of *habere facias possessionem*. The learned Judge directed a verdict for the defendant, with liberty to move to enter a verdict for the plaintiff. *Montagu Smith*, in *Michaelmas* term 1852, obtained a rule accordingly.

Butt and *Fitzherbert* now shewed cause. Stat. 3 *G. 4. c. 126. s. 49.* enacts that, "if any mortgagee or mortgagees of any tolls, tollgates, bars, chains, tollhouses and buildings, on any turnpike road, shall seek to obtain the possession of the said tollgates, bars, chains, tollhouses and buildings, in order to pay himself, herself or themselves the principal money and interest, or any part thereof, due to him, her or them, it shall be competent for him, her or them, as lessor or lessors of the plaintiff, and upon his, her or their demise only, and without

uniting in such demise the other mortgagees of the said tolls and premises, to obtain such possession; but such person or persons who shall obtain the possession thereof, shall not apply the tolls which may consequently be received by him, her or them, to his, her or their own exclusive use and benefit, but to and for the use and benefit of all the mortgagees of the said premises, *pari passu*, and in proportion to the several sums which may be due to them as such mortgagees." The defendant has brought an ejectment under this enactment; he is in possession under it as a trustee for the other mortgagees: and the question is whether the lessor of the plaintiff can turn him out. [*Coleridge J.* At the time when the lessor of the plaintiff commenced his ejectment, he had a right to bring it. How can that right be defeated by subsequent proceedings to which he is no party?] The right given by the statute is a very peculiar one; the mortgagee is authorized to make a demise, though he is not entitled to possession; his right to possession does not accrue until there is judgment for him. The defendant has been the first to obtain such judgment, and consequently has the prior right to possession.

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Montagu Smith, contra. Even if the defendant was right in his construction of the statute, that would only affect the issuing of execution, not the verdict; *Throstout dem. Turner v. Grey (a)*, *Doe dem. Morgan v. Bluck (b)*. (He was then stopped by the Court.)

Lord CAMPBELL C. J. Whatever the effect may

(a) 2 *Stra.* 1056.

(b) 3 *Camp.* 447.

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ultimately be on the possession, it is clear that the lessor of the plaintiff is entitled to the verdict. Whether he may be entitled to a writ of habere facias possessionem is not now to be decided. I am of opinion that, in ejectment brought under this statute, as in ejectment brought at common law, we are at the trial to consider the state of things at the time of the demise and the commencement of the action. In the present case the ejectment was well commenced; and if no subsequent proceedings had taken place the lessor of the plaintiff would have recovered on this demise. It would be strange if we were compelled to say that, this ejectment being well brought, the effect of subsequent proceedings, to which the lessor of the plaintiff was not privy, was such that the verdict and the judgment must be against the lessor of the plaintiff, and that he should be compelled to pay costs in an ejectment which he had a right to commence.

WIGHTMAN J. (*a*). As soon as it appeared that the lessor of the plaintiff had priority in commencing his ejectment, the case seemed to me at an end. Mr. *Butt* was driven to contend that the statute meant what is almost a contradiction in terms; viz. that the mortgagee might have judgment to recover the possession, but should have no right to the possession on which to found that judgment, until he had the judgment itself. I agree that, whatever the ultimate effect on the possession may be, the plaintiff is entitled to the verdict.

CROMPTON J. concurred.

Rule absolute.

(*a*) *Coleridge* J. had left the Court.

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WILLIAM ROBERTS and Others, Appellants, *against* *Saturday,*
The Overseers of AYLESBURY, Respondents. *January 15th.*

THE appellants, being rated for the relief of the poor of the parish of *Aylesbury* in the county of *Bucks*, gave notice of appeal to the Sessions: and, by consent and by order of a Judge, under stat. 12 & 13 *Vict. c. 45. s. 11.*, a case was stated for the opinion of this Court, which was in substance as follows.

The rate, so far as it related to the appellants, was on property described in the rate as "Market House, with the grounds belonging thereto, used and occupied for the tolls of the markets and fairs," situated in "the *Market Square, Kingsbury*, and other parts of the town." The appellants were named as the occupiers, and "*Acton Tindal*" as the owner, of the property rated. The notice and grounds of appeal, so far as is important for the purposes of the case, were as follows.

"That, if, in and by the said rate, it is intended to rate" the appellants "for or in respect of the tolls of or arising from the markets and fairs held in the said parish of *Aylesbury*, they say that they are not, nor are or is any or either of them, liable to be rated or assessed for or in respect of such tolls. That" the

Appellants were rated to the relief of the poor, on "the Market House, with the grounds belonging thereto, used and occupied for the tolls of the markets and fairs." It was admitted that under this description they were in fact rated not only for the Market House, but also for the tolls on merchandize sold in the market, and for payments made to the lord and his lessees for goods not sold but exposed for sale on stalls and otherwise; which payments, from time immemorial, were charged ac-

cording to the situation of the stalls and other circumstances, according to the discretion of the lord and his lessees; and also for payments made for leave to use temporary theatres, and shows. None of the stalls &c were in any way affixed to the soil. The lord was owner of the soil of the market. The tolls were from time immemorial received in the Market House. The appellants were lessees for a term of years under the lord. On a case stating the above facts: Held, that the tolls on goods sold were not the subject of a rate, and that the fact that such tolls were paid in the Market House made no difference: but that the other payments were in the nature of compensation for the use of the soil, and that they and the Market House were properly rated.

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appellants "are not the occupiers of, and have no title to, and are not liable to be rated or assessed for, any ground belonging to the Market House and situate in *Market Square, Kingsbury*, and other parts of the town, save only the ground on which the said Market House is erected and stands. That there is no ground belonging to the said Market House situate in *Market Square, Kingsbury*, and other parts of the town, save only the ground on which the said Market House is erected and stands. That, if, in and by the said rate, it is intended to rate" the appellants "for or in respect of the tolls of or arising from the market and fairs held in the said parish of *Aylesbury*, as attached to or inseparable from the occupation of the said Market House, then they say that such tolls are not attached to or inseparable from the occupation of such Market House."

By an indenture of lease, dated and made on 12th *October* 1848, between *Acton Tindal*, of &c. (Lord of the Manor of *Aylesbury with Burton*), of the one part, and the appellants, of the other part, the said *A. Tindal* granted, demised, leased and to farm let unto the appellants, their executors and administrators, all and every the tolls and duties, payable at the market and fairs of *Aylesbury* aforesaid, in respect of corn, grain and seeds, and of horses, oxen, sheep and kine, and of all other cattle, merchandize and other articles sold at the said market or fairs, and all rights and profits of stallage, piccage and all other tolls, duties, rights, profits, privileges and advantages whatsoever incident or belonging to the said market and fairs, and to or with the same, then or theretofore severally belonging, held, occupied or enjoyed, granted, demised, or letten, or accepted, reputed, deemed, taken or known, as part, parcel or

member thereof, or appertaining or incident thereunto, together with the Market House at *Aylesbury* aforesaid, and the corn bins and toll room therein, and also all that building, with the appurtenances, lately used as the cage, for the purpose of depositing therein stalls, grain and other articles of merchandize, and for all the other purposes of holding the said market and fairs, but for no other use or purpose whatsoever: except and always reserved, out of the said demise, unto the said *A. Tindal*, his heirs and assigns, full and free liberty for him, his heirs and assigns, and for his and their friends, agents and servants, with or without surveyors and workmen, to enter and go into and upon the said Market House and premises, at his, her and their free will and pleasure, to examine the state and condition thereof; and also except and reserved, out of the said demise, unto the said *A. Tindal*, his heirs and assigns, the full and free use of the said Market House and other rooms therein for any purpose not connected with the holding of the said market or fairs on any day other than a market or fair day, or other than a period for the collection of tolls, and of which the said *A. Tindal*, his heirs or assigns, should give six hours' notice to the appellants, or either of them, their or either of their executors or administrators, he the said *A. Tindal*, his heirs or assigns, doing no damage or spoil to the said demised premises, or to the stalls or other property of the appellants, or the survivor of them, his executors or administrators. Habendum for seven years, at a rent of 210*l*. By virtue of which the appellants entered.

"The said *A. Tindal*, as such Lord of the Manor as aforesaid, was, at the time when the said indenture of lease was made, and thence hitherto hath been,

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and still is, the owner of the soil of the streets and squares of the town of *Aylesbury* aforesaid; and he and his predecessors in title, as lords of the manor aforesaid, or their lessees, have, as far back as living memory goes, collected and received, at the market and fairs aforesaid, certain tolls and duties, in kind or in money, upon the sale of wheat, barley, oats, beans, peas, rye, vetches, turnip and clover seed, trefoil and all other grass seeds, sold in the said market and fairs; and also upon the sale or exchange of all horses, mares or geldings, bulls, oxen, cows, calves, sheep, pigs, and other cattle and stock, sold or exchanged in the said market and fairs; and also upon all fruit, vegetables, poultry, eggs, butter and all other goods and articles of merchandize in any way exposed for sale in the said market and fairs; and also for the stallage: the tolls upon corn, grain and seeds being generally taken in kind, a small measure full from each sack; and the tolls upon fruit, vegetables, poultry, eggs, butter and all other goods and articles of merchandize, being money payments charged for and upon each stall or stand upon which the same are respectively exposed for sale, as hereinafter mentioned, at the discretion of the said lord of the manor for the time being, or his lessees, according to the situation of such stall or stand, or other circumstances affecting the same. The said market and fairs at *Aylesbury* aforesaid have always, as far back as living memory goes, been and still are holden in a large square there called the *Market Square*, and along the sides of the streets and highways surrounding and leading to such square, and also in another open space or square there called *Kingsbury*, which adjoins and opens into the *Market Square* aforesaid, and

in another place called *Pitches Hill*; all the said places where such market and fairs are held being within the parish and manor of *Aylesbury*. The Market House, herein before mentioned, is a building standing in the centre of the said *Market Square*, and has existed, as far back as living memory goes, in its present state and situation: the ground floor of which building is an open space upon which sacks of corn and other grain and seeds are deposited and exposed on the market days for sale; and on an upper floor in the same building the corn bins, hereinbefore mentioned, are placed; and which corn bins are from time to time let out to the farmers and others who frequent the said market and fairs, for the purpose of depositing in such corn bins for their own convenience any corn or other grain or seeds which they may be desirous of leaving upon the spot. The lower part of the Market House has also, as far back as living memory goes, been from time to time let out for the hustings at elections, and upon other public occasions, for pecuniary considerations, by the lord of the manor for the time being or his lessee: but, the use of the said Market House and other rooms therein, for any purpose not connected with the holding of the said market and fairs on any day other than a market or fair day, or other than a period for the collection of tolls, having been expressly excepted and reserved by and to the said *A. Tindal* in and by the said lease as aforesaid, the said Market House has never, since the execution of the said lease, been so let out by the appellants. Upon about one half of the *Market Square* aforesaid, stalls have been, as far back as living memory goes, and still are, usually placed upon the market and fair days; on which stalls, meat and other goods and articles are ex-

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posed for sale: but neither these stalls, nor any other stalls, stands or tables in the said market and fairs aforesaid, are in any way affixed to or driven into the soil: and the other half of the said *Market Square*, and also the said open space or square called *Kingsbury*, is commonly used for the sale of horses, cows, pigs, sheep and other live stock. These usually either stand at the sides and corners of the streets, or in *Kingsbury* aforesaid, or are tied to the rails surrounding the *Market Square*, or are enclosed in pens, formed by four hurdles tied together at the corners, no part of such pens being in any way affixed to or driven into the soil. Upon certain portions of the sides of the streets surrounding the said *Market Square*, and also upon certain portions of the said other streets leading thereto, and of *Kingsbury* aforesaid, fruit, vegetables, poultry and other goods and articles are exposed for sale, generally either in baskets or on stalls or upon stands or tables placed upon, but in no way affixed to, or driven into, the soil. The above statement, as to the tolls, stalls, and the mode and places of holding the fairs and markets, and of exposing for sale and selling the live stock and various merchandize, articles and things above mentioned, is to be taken to be true as far back as living memory goes. The lords of the manor, and their lessees, for the time being, have also, as far back as living memory goes, and the appellants have, since the date of the said lease, been in the habit of letting to various parties, on fair days and other occasions, the right and privilege of placing and erecting temporary theatres and booths for shows, upon various open spaces of ground situated within the parish and manor of *Aylesbury*, and have derived therefrom considerable pecuniary profit: but none of such theatres,

booths or shows have been or are in any way affixed to or driven into the soil. All the tolls on the corn, grain and other seeds, exposed for sale in the said Market House as aforesaid, have been, as far back as living memory goes, and still are, received in the said toll room of such house: but all the other tolls and duties hereinbefore mentioned are and always have been, as far back as living memory goes, collected and received in those parts of the said parish of *Aylesbury* wherein and whereon any live stock, merchandize, articles and things, in respect of which such last mentioned tolls and duties are payable as aforesaid, are exposed for sale. It is admitted that the appellants are in fact rated, in and by the said rate, for the said Market House, and for all the land so far as the same is demised to them in and by the said lease, and for the stallage, piccage and for all the tolls held, occupied, received and enjoyed by them within the parish of *Aylesbury*.

It is agreed that the Court of Queen's Bench shall, if it shall see fit, be at liberty to draw such inferences from the facts above stated as the Court of Quarter Sessions, upon the trial of the said appeal, might have drawn.

The appellants contend that, at the time the rate appealed against was made, they were and still are rateable to the relief of the poor of the said parish of *Aylesbury* in respect only of the said Market House. The respondents, on the contrary, contend that the appellants were, when the said rate was made, and still are, rateable in respect of all the property they are rated for in and by the said rate as aforesaid.

The question for the opinion of the Court is, Whether the appellants were, when the rate appealed against was made, rateable to the relief of the poor of the parish

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of *Aylesbury* in respect of all or any portion of the property in respect of which they are rated in and by the said rate as aforesaid. If the Court shall be of opinion that the appellants were, when the said rate was made, rateable in respect of all the property in respect of which they are so rated as aforesaid, in and by the said rate, then the said rate is to be confirmed. If the Court shall be of opinion that the appellants were, when the said rate was made, rateable in respect of some portion only of the said property in respect of which they are so rated as aforesaid, then the Court is requested to state in respect of which portion they are so rateable; and the said rate upon the appellants is to be amended and reduced according to the annual rateable value of such portion. It being agreed that such rateable value as last aforesaid shall be ascertained and determined upon and according to the principle laid down by the judgment of the Court by two valuers, one to be chosen by the appellants and the other by the respondents, or, in case of their disagreement, by their umpire to be by them chosen before they enter upon their valuation. The Court is also requested to adjudge the costs to be paid by the appellants or respondents.

O'Malley, in support of the rate. It is admitted by the appellants that they are rateable in respect of the Market House, and that the rate is so far good. It is also admitted by the respondents that the rate is, in fact, made on the tolls as well as on the Market House. The question, therefore, comes to be whether tolls, such as described in this case, or any or which of them, are rateable. Market tolls, properly so called, that is tolls payable in respect of things sold in a market, are not

rateable. The reason is, that they are not connected with the realty. As far therefore as such tolls are concerned, the only point is whether the fact, that they have from time immemorial been received in the Market House, makes any difference. [Lord *Campbell* C. J. Suppose that mortgage money or an annuity is made payable in *Lincoln's Inn Hall*: do you say that would make it a corporeal hereditament?] It must be conceded that the market tolls proper are not rateable. But under the general name of tolls, in this case, are included payments made to the appellants, not for things sold in the market, but for the stalls and the use of the part of the market place on which they are exposed for sale, whether sold or not. Such a payment is not properly a toll, but stallage; *Com. Dig. Market* (F 1.). No man can erect stalls or place tables in a market without the leave of the owner of the soil; *The Mayor, &c. of Northampton v. Ward* (a), *The Mayor, &c. of Norwich v. Swan* (b). The payment made for this license is so attached to the soil that, if the land be borough English, the heir at common law shall have the market and the toll, but the younger son shall have the stallage and the piccage with the soil; *Heddey v. Welhouse* (c), recognized in *Rex v. Bell* (d). Stallage is in effect a payment for the use and occupation of the soil: *Littledale* J. so explains it in *Mayor, &c. of Newport v. Saunders* (e). The distinction between the market tolls and stallage is like that between toll thorough, which is incorporeal, and toll traverse, which is taken in respect of the soil. Toll traverse is rateable; *Regina v. The Marquis of Salisbury* (g).

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(a) 2 *Str.* 1238.(b) 2 *W. Bl.* 1116.(c) *Moore*, 474.(d) 5 *M. & S.* 221.(e) 3 *B. & Ad.* 411.(g) 8 *A. & E.* 716.

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Pashley, contra. The question is now confined to the tolls paid in respect of goods sold on stalls. [Lord Campbell C. J. No. The payments to which the question is now confined are made for the privilege of using stalls and for exposing goods for sale and other purposes. It is quite immaterial whether the goods are sold or not. I do not see, on principle, any distinction between using the soil by placing a stall upon it, or, a table, or by placing goods directly upon it, or otherwise, if the soil be in fact occupied, and a consideration paid for its occupation to the owner or his lessee]. Such a liberty is like the way leave in *Rex v. Jolliffe* (a), which was held not rateable. There are no words in stat. 43 *El. c. 2. s. 1.*, including this liberty; it cannot be comprehended under the term "lands."

Lord CAMPBELL C. J. The case is now reduced to a single point. Mr. *O'Malley*, in the course of the argument, very properly abandoned the claim to rate the market tolls, which have nothing to do with the occupation of the soil. But he successfully contended that what are called the stallage tolls are payments made to the appellants for the use of the soil for the time; and that, if so, the appellants are rateable for them under stat. 43 *El. c. 2. s. 1.* The person using a stall has for the time being the use and occupation of that part of the soil on which it stands. The compensation, which is paid to the owner of the soil or his lessee for the use of the soil in this way, is quite different in its nature from the toll payable to the lord of the market for goods sold; that toll is quite irrespective of the ownership or occupa-

tion of the soil. Then, on general principles, whatever profit is made by the occupation of the soil is properly rated. I do not see on what principle the payments made in respect of the use of the stalls are to be distinguished from the tolls payable for way leaves, in the coal districts in the North, which are always rated. So far, therefore, as the rate is imposed on the Market House, and on the payments in respect of goods not sold, it is good, but not in so far as it is on the tolls or goods sold; and it must be amended accordingly. The parties have agreed as to the manner in which the amount is to be ascertained.

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COLERIDGE J. I perfectly agree. The persons here rated are not those who on market days use the stalls from time to time, and make payments to the appellants, for such use. Their occupation probably would be too fleeting to render them properly rateable. But the persons rated are the tenants for a term of years of what is in effect the use and occupation of the soil of the market place, on particular days, to be turned to profit in a particular manner. *Rex v. Jolliffe (a)* is quite consistent with our decision. There the appellant used two way leaves. One was over land occupied jointly by himself and another. If the use of the way leave rendered that land more valuable, that was or ought to have been taken into account in the rate imposed in respect of the land on himself and his cotenant. The other way leave he used; but he had no occupation of it; he paid to the occupier of the soil a toll for each ton of coals

(a) 2 T. R. 90.

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which he carried along it. He was, in respect to that way leave, much in the same situation as the persons, in the present case, who come to market and make a payment for the temporary use of a portion of the soil. That case therefore was properly decided, and is perfectly consistent with the principle on which we now act.

WIGHTMAN J. Stallage may be considered as a compensation, in the nature of ground rent, paid by the person who for the time uses a portion of the soil to the owner who permits him so to do. Mr. *Pashley's* argument consisted in applying the term toll to this, and then arguing that, as tolls were not rateable, this was not. But it is in the nature, not of toll, but rather of ground rent.

CROMPTON J. I am of the same opinion. The appellants occupy the land on market days by means of persons who pay them for leave to use it. They are occupants of land; and in that way they make a profit from their occupation; and they are properly rated in respect of such their beneficial occupation.

Rate to be amended on this principle.

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The QUEEN *against* The Inhabitants of
St. LEONARD'S, SHOREDITCH.

Saturday,
January 15th.

Reported, 14 Q. B. 340.

DUGDALE *against* The QUEEN.

Saturday,
January 15th.

THE defendant was indicted at the *Middlesex* Sessions.

The indictment contained seven counts.

The first count charged that defendant, "unlawfully and wickedly devising, contriving and intending, as much as in him lay, to vitiate and corrupt the morals of the liege subjects," "and to incite and encourage the said liege" &c. "to indecent, obscene and immoral practices, and bring them to a state of wickedness, lewdness and debauchery, heretofore, to wit on" &c., at &c., "unlawfully, wickedly, knowingly, wilfully and designedly, and in order to effect and bring about such his most wicked devices and contrivances, did obtain and procure divers, to wit one hundred, indecent, lewd, filthy, bawdy and obscene prints, and divers, to wit one hundred, indecent, lewd, filthy, bawdy and obscene pictures, then and there respectively tending to scandalize and debase human nature, and then and there representing and exhibiting" &c., "in order and for the purpose of afterwards unlawfully uttering, publishing, selling and disseminating, and causing to be uttered, published, sold and disseminated, the said prints and pictures, to and amongst the liege" &c., "and thereby contaminating, vitiating and corrupt-

It is a misdemeanour to procure indecent prints with intent to publish them.

But to preserve and keep them in possession with such intent is not a misdemeanour.

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 DUGDALE said liege" &c. "to a state of wickedness, lewdness,
 The QUEEN. debauchery and immorality. In contempt" &c., to the
 evil example &c., and against the peace &c.

The second count charged that defendant, "unlawfully and wickedly devising and contriving, as in that" (the first) "count also mentioned, afterwards, to wit on" &c., at &c., "unlawfully, wickedly, knowingly, wilfully and designedly, did preserve and keep in his possession divers, to wit one hundred," &c. (as before), "with the intent and for the purpose of unlawfully and wickedly uttering," &c. (as in the first count).

The other counts were for different offences, but were framed, as to the points upon which the Court decided, like either the first or second count.

Plea: Not guilty. Issue thereon.

The defendant having been found Guilty, judgment was passed upon him, separately upon each count: whereupon he brought error in this Court. Joinder in error.

W. J. Metcalfe, for the plaintiff in error. The question on the first and corresponding counts is, whether the procuring obscene prints with intent to publish them be a misdemeanour at common law. The counts charge no attempt to publish. On the second and corresponding counts the question is, whether the possessing with intent to publish be a misdemeanour, no act at all being charged. [*Lord Campbell C. J.* As to those counts, the defendant below might have procured the prints without the intention of selling them, and have afterwards conceived the intention: then there would have been nothing

done.] In *Rex v. Sutton* (a) the defendant was indicted for possessing stamps which would impress the sceptre (b) on coin, with intent to utter sixpences for half guineas: and, though no act was done, this was held to be a misdemeanour. But that case was overruled in *Rex v. Heath* (c), where it was held not to be an offence knowingly to have in possession counterfeit coin with intent to utter (d). In a note to the report of that case it is suggested that the facts would have supported a good indictment for procuring with intent to circulate. That would answer to the first and corresponding counts here: the question is, whether they charge a crime. [Coleridge J. How do you distinguish the case from *Rex v. Fuller* (e)?] There it was certainly held to be a misdemeanour to procure counterfeit coin with intent to utter. Possibly the intent to utter counterfeit coin, a statutable offence, may be distinguishable from the intent to publish obscene works, which is a common law misdemeanour. That, however, was not a case upon error, but only an opinion to which the Judges came upon being consulted: and the case is very shortly reported. [Lord Campbell C. J. As at present advised, I should adhere to *Rex v. Fuller* (e): under the counts which we are now considering, no one could be convicted without having done an act.] By stat. 14 & 15 Vict. c. 19. s. 1., if a person is found by night in possession of any picklock, &c., without lawful

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(a) *Ca. K. B. temp. Hardw.* 370; *S. C.* 2 Str. 1074.

(b) The indictment not charging that the stamp would impress the similitude of either side of a coin, but only that of part of a side, the possession was not considered an offence within stat. 8 & 9 W. 3. c. 26, s. 1.

(c) *Russ. & R.* 184.

(d) In 1810. See now stat. 2 & 3 W. 4. c. 34. s. 8.

(e) *Russ. & R.* 308.

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excuse, he is guilty of a misdemeanour: in cases not under that act, would it be a misdemeanour to make a picklock with intent to commit a burglary? [Lord Campbell C. J. That statute gives a very stringent power for the repression of burglaries, by making the possession, under certain circumstances, indictable: but it does not mention the procuring, and suggests no inference that procuring the instrument, with the intent, was not previously indictable.]

Clarkson, contra, was stopped by the Court.

LORD CAMPBELL C. J. We have decisions on both sets of counts. *Rex v. Heath* (a) shews that those counts cannot be supported which merely charge a possession with intent to publish: the mere intent cannot constitute a misdemeanour when unaccompanied with any act. The case is precisely in point. But, as to the counts which charge a procuring with intent to publish, we find that in *Rex v. Fuller* (b), in *Easter* term 1816, all the Judges were of opinion that the procuring counterfeit coin with intent to utter was a misdemeanour, and that this might be evidenced by the possession. Must not the law be the same as to the publication of indecent prints? The circulation of counterfeit coin is a statutory offence; the circulation of indecent prints is punished at common law for the protection of morals. The procuring of such prints is an act done in the commencement of a misdemeanour, the misdemeanour being the wicked offence of publishing obscene prints.

COLERIDGE J. I am of the same opinion. The law

(a) *Russ. & R.* 184.

(b) *Russ. & R.* 308.

will not take notice of an intent without an act. Possession is no such act. But procuring, with the intent to commit the misdemeanour, is the first step towards the committing of the misdemeanour.

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WIGHTMAN J. I concur on both points. Mr. *Metcalf* has clearly shewn that the possession is not indictable, as not being an act: but the procuring is an act.

CROMPTON J. *Rex v. Fuller (a)* is a distinct authority. Judgment on the first and corresponding counts affirmed.

(a) *Russ. & R.* 308.

HEYWOOD *against* POTTER.

Monday,
January 17th.

CASE. The first count charged that plaintiffs, before and at the time of the committing &c., and after the passing of an Act &c. (5 & 6 *Vict. c.* 100., "to consolidate and amend the laws relating to the copyright of designs for ornamenting articles of manufacture"), and after 1st *September* 1842 (a), and before and at the time of the registration of the design thereafter mentioned, were and still were (within the meaning and protection proper number, as prescribed by sect. 4: the ordinary practice in the trade was to sell hangings in larger pieces, but to mark patterns such as those which were published. Held, that he was not protected by the Act against parties copying the design from such pattern pieces, and publishing articles with such design applied to them.

The proprietor of a design applied to paper hangings, registered according to the provisions of stat. 5 & 6 *Vict. c.* 100., published pattern pieces, containing the whole design, not bearing the letters "R" and the

Per Lord *Campbell* C. J. and *Wightman* J. Dissentiente *Coleridge* J.

(a) See sect. 1.

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of the said Act) the proprietors of a new and original design for, and applicable to, the ornamenting articles of manufacture, to wit of a new and original design for and applicable to the ornamenting paper hangings: and not &c. (negating the cases excepted by Schedule (C.)), and not previously published in *Great Britain* &c.: that plaintiffs afterwards, before the publication of such design, in pursuance of and according to the provisions of the said Act, "caused the same design to be, and the same accordingly then was, duly registered in respect of the application of such design to ornamenting articles, to wit articles of manufacture contained and comprised in Class 5" in the Act mentioned, "by specifying the number of the class in respect of which such registration was made at the time of such registration, and the name of the plaintiffs as proprietors thereof, to wit the name" &c. (of plaintiff's firm), together with the place of business: whereby plaintiffs became the proprietors of and entitled to the copyright of the said design, and entitled to the sole right to apply the said design, to wit to articles of manufacture contained within the said Class 5, "to wit to paper hangings, within the United Kingdom," for three years from the time of the registration. That plaintiffs had applied the design to the ornamenting of articles of manufacture contained &c. (as above). Breach: that defendant, well knowing &c., within three years from such registration, and within twelve calendar months before the commencement of this suit, in *England*, wrongfully and without the license or consent in writing of the plaintiffs, and while plaintiffs were the proprietors of such design and so entitled to the copyright, against the form &c., applied such design, for the purpose of sale, to the ornamenting of certain articles of

manufacture, to wit 20,000 pieces of paper hangings, the same being respectively of the class of articles of manufacture in respect of which the said copyright was then in force by reason of the registration, according to the provisions &c., and thereby wrongfully infringed upon and deprived plaintiffs of their said copyright of and in the said design, and of the sole right to apply &c., to wit to paper hangings.

The second count, after stating the proprietorship and registration by plaintiffs of the design, as in the first count, stated that defendant, within three years &c., in *England*, and without the consent &c., and while plaintiffs were the proprietors &c., sold divers articles of manufacture, to wit 20,000 pieces of paper hangings, to and upon each of which said pieces of paper hangings respectively the said design so registered was applied for the purpose of ornamenting the same respectively, each and every of the said pieces of paper hangings being of the class of articles of manufacture in respect of which the said copyright was then in force, defendant having knowledge that the consent of plaintiffs had not been given to the application of the said design to the said pieces of paper hangings so sold respectively: contrary to the form &c.

Plea 6, to 1st count: That, after publication of the said design, and before the time of the committing &c., to wit on &c., divers articles of manufacture comprised in the said Class 5, to wit 20,000 pieces of paper hangings, to which the said design had been applied by plaintiffs, were published by plaintiffs without having thereon or on any of them, at the time when the same were published by plaintiff, the letters "R^d": contrary &c.: verification. Replication: That each and every

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of the articles of manufacture contained in the said Class 5, to which the said design had been applied at the time when the same were published by plaintiffs, had thereon respectively the letters "R^d," according to the form &c., and were not, nor were nor was any or either of them, published by plaintiffs without having thereon, at the time when the same were so published respectively, the letters "R^d," in manner and form &c.: conclusion to the country. Issue thereon.

There was a similar plea, the eleventh, to the second count; and a similar issue. There were also other issues of fact, not now material.

At the trial, before Lord *Campbell* C. J., at the *London* Sittings in last *Trinity* vacation, it was admitted that the plaintiffs had sold, as patterns only, certain small pieces of paper hangings containing the whole design registered by them. The patterns sold had not the letters "R^d" on them, or any number or letter corresponding with the date of the registration of the design in the mode directed by stat. 5 & 6 *Vict. c. 100. s. 4*. The defendant bought some of these, and imitated the design, without knowing that it was registered. It was contended for the defendant that the plaintiffs were not entitled to the protection of sect. 3, inasmuch as the provisions of sect. 4 had not been complied with. It was contended for the plaintiffs that these pieces did not require the marks of registration, being only small pattern pieces, and therefore not falling within the description "article of manufacture" in sect. 4. It was shewn, in evidence, that paper hangings were usually sold in pieces of twelve yards long, and that the plaintiffs were in the habit of marking, with the letters R^d and the number, all pieces of that length. The Lord Chief

Justice left to the jury, Whether or not it was the general custom of the trade to mark pattern pieces, such as those that had been sold, with the marks of registration. The jury found that the more general custom was to do so, and, under the direction of the Lord Chief Justice, found a verdict for the defendant on the issues upon the sixth and eleventh pleas, and for the plaintiffs on all the others. Leave was reserved to move to enter a verdict for the plaintiffs on the issues found against them.

In last term, *Bramwell* obtained a rule accordingly.

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Webster now shewed cause. The question depends upon the meaning of the words "article of manufacture," in sect. 4 of stat. 5 & 6 *Vict. c. 100*. That section enacts "that no person shall be entitled to the benefit of this Act, with regard to any design in respect of the application thereof to ornamenting any article of manufacture," unless the design shall have before publication been registered, "and unless at the time of such registration such design have been registered in respect of the application thereof to some or one of the articles of manufacture or substances comprised in the above mentioned classes" (in sect. 3), "by specifying the number of the class in respect of which such registration is made," "and unless after publication of such design every such article of manufacture, or such substance to which the same shall be so applied, published by him, hath thereon," "at the end or edge thereof, or other convenient place thereon, the letters 'R^d,' together with such number or letter, or number and letter, and in such form as shall correspond with the date of the registration of such design according to the Registry of Designs in that behalf." The pattern pieces in question, which contain

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the whole of the registered design, clearly come within the meaning of the phrase "article of manufacture;" and the proprietor of the design is bound to place the proper marks of registration upon each of them. It will be contended that these patterns are not "paper hangings" (which constitute Class 5 in sect. 3) in the ordinary meaning of the word, inasmuch as they are not of the usual length at which paper hangings are usually sold. But it does not appear that there is any customary length for paper hangings; and, if to each piece, of whatever length, the whole design is applied, the pieces are "paper hangings," and must therefore have the marks of registration. It is clearly not enough that the large articles manufactured after these patterns should alone have the marks. The design and the article to which it is applied must be taken in combination. When there is so much of the article as to receive and exhibit the application of the whole design, that is enough of it to make it an article of manufacture within the meaning of the statute. By sect. 17 any person may inspect a design of which the copyright has expired; but no registered design of which the copyright has not expired shall be open to inspection, except by a proprietor or a party authorized in writing by him, or authorized by the registrar: but it is provided that any person producing a design with the registration mark may obtain from the registrar a certificate stating whether there is a copyright, and, if so, in respect of what article of manufacture it exists. How is a stranger to avail himself of these provisions, either for his own information or to avoid infringing upon copyright, unless what he sees exposed to public view bears the statutory marks of registration? The object of sect. 4, which was to prevent the public

from unwittingly copying registered designs, would be frustrated if the samples, from which the designs are most likely to be copied, bear no signs of having been registered. [Lord *Campbell* C. J. If a pattern piece be without a number or the letters "R^d," you say that will amount to an intimation that the design is not registered?] That is so. And therefore the proprietor of a design, who has registered it, must, in order to assert his copyright to its full extent, mark every piece that he publishes. There are several designs, no doubt, of so short duration as to their application, that the proprietor often sends into the market many pieces without the marks of registration, inasmuch as he would gain little by the protection: but, when the design is to be permanently used, and is valuable, the precaution will become important: and the proprietor, if he will not take the statutory precaution, cannot complain if the design is copied. There is no difficulty in affixing the marks: the close of sect. 4 shews that this may be done by making it on the material, as, for instance, by a water mark. The act is penal, and will be construed strictly.

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Bramwell and *Lush*, *contra*. The words "article of manufacture" were intended by the Legislature to include only such articles, with the registered design applied, as are the subjects of sale; not mere fragments of such articles, like the pattern pieces in question. The former is the ordinary meaning of the words; and the statute did not intend to create any other. "Article of manufacture" must bear the same meaning in sects. 3 and 4. Now in sect. 3 the whole "paper hangings" mentioned in Class 5, of the shape and size in which they are sold, constitute the article of manufacture which is to

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be marked as registered; not the pattern sample; just as, with respect to Classes 6 and 7, the whole carpet and the entire shawl are the articles of manufacture, and not pieces of either, used as patterns only. [Lord *Campbell* C. J. Might not half a carpet be sold?] Perhaps it may be the custom of the trade to sell half of a carpet; but it was in evidence at the trial that in the paper hanging trade the ordinary practice was to sell the pieces in lengths of not less than twelve yards. At all events, sect. 7, which prohibits, under a penalty mentioned in sect. 8, the publication or sale of articles of manufacture to which a registered design has been applied, and sect. 9, which gives the proprietor a right of action in the case of such publication or sale, can be intended to apply only to an article of manufacture of the size and form in which it is ordinarily sold for use. [Lord *Campbell* C. J. These pattern pieces might be used for papering a room.] The Legislature must be supposed to have had in view the ordinary size adopted for that purpose. [Lord *Campbell* C. J. Would you say that a piece of paper twelve yards long, but sold *bonâ fide* as a pattern, need not have the marks of registration?] The purpose for which the article is sold is not material; but its form and dimensions must, on the face of it, be such as to allow of its being used for ordinary purposes. [Wightman J. Would a piece twelve yards long, but manufactured solely as a pattern, be within the act?] No; it would not be a paper hanging, in the ordinary sense of the term. *De La Branchardiere v. Elvery* (a) decides that copies of a registered design, published in a book for sale, need not have any registration mark attached to

(a) 4 *Exch.* 380.

them. The difficulty pointed out, of ascertaining whether a design be registered or not, will exist wherever an article having the letters "Rd" on it is divided into two pieces. [*Wightman J.* What do you say was the object of the Legislature in providing for the registration of designs?] No doubt it was, as has been stated, to protect the public from unwittingly imitating designs of which the copyright had been secured. But it never could have been intended to carry that protection so far as to fix no limit to the size and form of the articles which are to be marked; so that, for instance, a pattern of not more than a square inch in size, yet containing, as is not unfrequently the case, the whole of the design, should require to be marked, as much as a piece twelve yards in length, in which the design is repeated a great number of times: that would entail a great hardship upon the manufacturer, who, after all, is not the party expressly required by the statute to place the marks of registration upon the article manufactured. Sect. 18 recognizes a distinction between a "paper hanging" and "a piece end of a registered pattern, with the registration mark thereon." It has not been found necessary, for the protection of the public against patentees, to require that every portion of the article should have a mark.

Lord CAMPBELL C. J. I am of opinion that the plaintiffs have not complied with the provisions of the statute. The Legislature, in giving protection to the proprietors of designs, requires that every article of manufacture containing the design secured shall, if put forth by the manufacturer in the ordinary course of

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trade, contain certain marks, as a caution to the public that the design of such article has been secured to the proprietors by registration. I cannot see that any limit is fixed to the size of the article so put forth. It appeared at the trial that the custom of the trade was to sell paper hangings in lengths of not less than twelve yards, but that smaller pieces were sold as patterns only. The plaintiffs sold some of these, which did not contain the marks of registration; and the defendant imitated the design without the intention of pirating it, and without being aware that the design was registered. I do not see that the use to which the article is to be applied affects the question. It is equally an article of manufacture, and equally an article of trade, whether it be manufactured and sold as a pattern or for actual use: and, if it contains no marks of registration, is just as likely to mislead a purchaser as a larger piece. Moreover, the jury found that the ordinary practice of the trade was to mark even the small pattern pieces in question. I see no hardship upon the manufacturer in that practice; and, if the plaintiffs had conformed to it, the defendant would not have been misled into an imitation of the design. Looking at the object of the statute, and the mode which it prescribes for carrying that object into effect, I am of opinion that the plaintiffs have not complied with the conditions imposed upon them in consideration of the copyright which has been secured to them. The rule must therefore be discharged.

COLERIDGE J. I confess that I have arrived at a different conclusion from my Lord. I admit that this is an article of manufacture in the ordinary sense of the

word; but I think it is not so in the sense intended by the statute. The practice of the trade is not very material, looking at the recent date of the act. But the interpretation of the term "article of manufacture" may be gathered from an examination of sect. 3, which divides those articles of manufacture into thirteen classes. If the pieces in question come within any one of these classes, they belong to Class 5, "paper hangings." Now can these pieces, sold merely as patterns, be properly considered as paper hangings? I think not. There is a broad distinction, as it seems to me, between the pattern of an article, and the article itself, between what is the ordinary subject of trade, and what is put forth, as it were, to induce such trade. The argument as to the supposed protection of the public does not appear to me sound. I do not see how the protection to the public would be increased by the interpretation contended for by the defendant. It is conceded that, if a manufacturer places the marks of registration upon a piece of the ordinary trade size, and then divides such piece into several smaller portions, all these portions but one go forth to the public without any evidence of registration to protect purchasers from imitating the design. There is just as much danger with respect to such unmarked pieces as with respect to the pattern pieces in question.

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WIGHTMAN J. After some doubt, I am of opinion that the plaintiffs have not complied with the statute. The question is whether these pattern pieces are articles of manufacture within sect. 4. That they are articles of manufacture there can be no doubt: and the only question is, whether they are so within the meaning of the statute. It is said that sect. 4 has in view such articles

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 HEYWOOD that here we have to inquire whether the articles in
 v. question be "paper hangings," within Class 5. I have a
 POTTER. difficulty in defining what it is that makes the manufac-
 tured pattern a paper hanging, or when it is not so.
 But the distinction suggested gets rid of the obvious
 intention of the Legislature, which was, to prevent the
 public from unwittingly imitating the design of any
 public article, if such design has been registered. I
 think therefore that the statutory condition has not
 been complied with.

Rule discharged (a).

(a) *Crompton J.* was absent, in consequence of a domestic calamity.

Monday,
 January 17th.

HASTINGS *against* J. BROWN.

A specification in a patent, for a particular construction of windlasses, stated that the object was "to hold, without slipping, a chain cable of any size." Before the date of the patent, constructions were known by which a windlass might be made to hold a single chain cable of any assigned size.

CASE. The declaration stated that *Charles Johnstone* was the true and first inventor of "certain improved arrangements for raising ships' anchors and other purposes," and had obtained letters patent to himself, his executors, administrators and assigns, for the invention. The declaration then set out the letters patent, which contained the usual proviso that, if *C. Johnstone* should not particularly describe and ascertain the nature of the said invention, and in what manner the same is to be performed, by an instrument in writing under his hand and seal, and cause the same to be inrolled in the Court of Chancery within six calendar months next after the

Held: that the specification did not unequivocally shew that the object was to construct a single windlass which might hold different chain cables, whatever their size; and that such a windlass was therefore not protected by the patent.

date of the letters patent, the letters patent should cease and become void. The declaration alleged that *Johnstone* afterwards, and before the committing &c., and within six months &c. (allegation of a specification and enrolment, in conformity with the proviso). That *Johnstone*, afterwards and before the committing &c., assigned the letters patent, and all right &c., to plaintiff, his executors &c. Breach: that defendant, without the leave &c., had used divers parts of the invention, which were described.

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Pleas. 1. Not guilty. Issue thereon.

2. That *Johnstone* was not the true and first inventor of the alleged invention: conclusion to the country. Issue thereon.

3. That the supposed invention was not an invention of improved arrangements for raising ships' anchors and other purposes, in manner &c.: conclusion to the country. Issue thereon.

4. That the supposed invention in the letters patent and specification in the declaration mentioned was not, at the time of making the letters patent, new as to the public knowledge, use and exercise thereof, but, on the contrary thereof, had been and was, wholly and in part, publicly known, practised, used, exercised and vended, to wit within that part &c. called *England*, before the date and grant of the letters patent, to wit on &c.: verification. Replication: That the invention &c. was, at the time &c., new as to the public knowledge &c., and had not, at any time before the date of the letters patent, been, wholly &c., known &c.: conclusion to the country issue thereon.

5. That *Johnstone* did not, within six months &c.,

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cause to be inrolled &c. (negating the inrolment, as alleged in the declaration), in manner &c.: conclusion to the country. Issue thereon.

6. That *Johnstone* did not, by the instrument in writing or specification in the declaration mentioned, particularly describe and ascertain the nature of the invention, and in what manner the same was to be and might be performed; in manner &c.: conclusion to the country. Issue thereon.

On the trial, before Lord *Campbell* C. J., at the *London* sittings after last *Trinity* term, it appeared that the invention which the plaintiff claimed consisted of an alleged improvement upon the structure of that part of a ship's windlass round which the chain cables of anchors are wound, and by which they are held fast without slipping. The form, which the plaintiff claimed as *Johnstone's* invention, was denominated a scalloped shell; and the novelty upon which he insisted was the applicability of a single windlass, so constructed, to every size of chain cable. It was admitted, on the part of the plaintiff, that there was no novelty in constructing a windlass so as to hold fast a single chain cable of any given size. The specification, so far as material to the question decided, was as follows. "The scallop shell, in which the iron chain cable appears in the drawing, is upon a new plan, to hold, without slipping, a chain cable of any size, as shewn by the opening form of the scallops at the top and bottom of figure 2." "And I also claim, as my invention, the new form of a scalloped shell (as shewn in figure 2), in conjunction with the arrangements herein-before described." For the defendant, it was contended that this specification did not describe the invention claimed. The drawing referred to in the specification

appeared to shew a construction applicable either to a single cable or to cables of different sizes. The Lord Chief Justice declined to stop the case: and a verdict was found for the plaintiff, leave being reserved to move to enter a nonsuit.

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In *Michaelmas* term, 1852, Sir *F. Thesiger*, Attorney General, obtained a rule Nisi for a nonsuit, or for a new trial, on the ground that the verdict was against the weight of evidence.

Sir *A. J. E. Cockburn*, Attorney General, *Webster* and *Holl* now shewed cause, and contended that the words "cable of any size," in ordinary language, signified "cables of all sizes;" and that the specification described a contrivance by which a single windlass was adapted for any size of cable, that is, for cables of all sizes.

Sir *F. Thesiger* (with whom were *Montagu Smith* and *Badeley*), contra, contended that the words of the specification indicated only that a windlass might be adapted to any one given size of cable. [He was then stopped by the Court.]

LORD CAMPBELL C. J. The rule for a nonsuit must be made absolute. At the trial I thought it more satisfactory that the case should go to a verdict than that there should be a nonsuit. But it is clear that the patentee ought to state distinctly what it is for which he claims the patent, and describe the limits of the monopoly. That is not done by this specification. The claim is for an invention by which a single windlass may raise cables of different diameters, which is allowed to be

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a great improvement. But is that pointed out by the specification? The words are, at best, equivocal. If he claims for a windlass that is fitted for one cable only, of whatever size, there is no novelty: and the vice of the specification is that it does not assert that more can be done by the invention. The title tells us nothing. But the words of the specification are "a chain cable of any size." "A" applies to one only: at all events, the phrase is capable of that meaning: and the specification, if it be equivocal, is bad. I see nothing in the word, or in the drawing, that necessarily indicates the contrivance to be for fitting more than one cable. You might make a windlass according to the drawing which would do no more than that. The specification therefore is bad; and there must be a nonsuit.

COLERIDGE J. I am of the same opinion. The law is admitted. If the specification, upon a fair interpretation, be equivocal, it is insufficient. In order to ascertain the meaning of the word, we go back to the state of things which existed when the patent was granted. At that time a windlass might be made which would hold a single cable of any size, but which was confined to that one size. That was a great inconvenience: and it was desirable to devise a windlass fitted for different sizes, no matter what. Now, if the words in question might describe either one or other of such windlasses, they are ambiguous; and it appears to me that there is such an ambiguity. But more: I should understand the meaning to be a windlass adapted to a single cable of whatever size, and that this was the principle insisted upon. The specification does not go on to

say that the windlass, framed as described, will hold cables of different sizes: yet it is necessary to shew that this was what was in the patentee's mind. If it was, the expression is strange. It is very doubtful whether the words could mean that: but at all events they bear the other meaning equally well.

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WIGHTMAN J. The plaintiff claims the right to the exclusive use of the invention of a windlass which will hold several chain cables of different sizes: the question is, whether such a windlass is described in the specification. In the first place, the title of the patent indicates no such invention: there is nothing to shew that more than an improvement in leverage is intended. But then the specification speaks of a scalloped shell, "to hold, without slipping, a chain cable of any size." Now, not only from the words but from the drawings, any one who wished to construct a windlass which would hold a single cable that was wanted, of whatever size, might think that this was what was meant. It is enough, however, if the expression be ambiguous. I think the description is capable of the construction which I have mentioned, and that indeed such is the more natural construction of the words.

Rule absolute for a nonsuit.

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Tuesday,
January 18th.

JAMES PATRICK CORCORAN *against* SAMUEL
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A cargo of barley insured, subject to the usual memorandum, sustained an average loss. The ship sailed from *Nantes* to *Dublin*: by stress of weather she was driven into the bay of *Palais* on the North coast of *France*, where she anchored. The wind increasing, the anchor dragged: and, for the preservation of all on board, the captain slipped the chains, got the ship under sail, and succeeded in entering *Sanzon*, which is a tidal harbour; where, by reason of its being then low water, the ship took the ground. On a case stating these facts, and raising the question whether the ship was stranded: Held: that she was stranded within the meaning of the memorandum, as she had not taken the ground in the ordinary course of management in a tidal harbour, but from an unusual state of things.

ASSUMPSIT on a policy of marine assurance on barley, subject to the usual memorandum, "corn" &c. "warranted free from average, unless general or the ship be stranded," claiming for a partial loss. Plea: that the ship was not stranded. Traverse thereof. Issue thereon. By consent, and by order of a Judge under stat. 3 & 4 *W. 4. c. 42. s. 25.*, the following case was stated for the opinion of this Court.

The ship *Victorine*, in the pleadings mentioned, sailed from *Nantes*, bound for *Dublin*, on the 8th day of *March* 1850, with a cargo of barley and flour, and prosecuted her voyage without any accident or misadventure, until the 10th day of *March* in the same year, when, from stress of weather, the captain was obliged to bear up and run into the bay of *Palais* on the coast of *France*. While the said ship was lying in the said bay, the wind increased to a gale from north east to east, and in consequence thereof the captain let go the two bower anchors and chains, paying in the meanwhile due attention to the pumps. At half past eight o'clock, in the forenoon of the same day, the large anchor dragged; and, in consequence thereof, and after consulting with the officers and crew, and for the preservation of the

said ship and cargo and of the lives of all on board, and particularly with the purpose of preventing the said ship from going on shore, the captain slipped his two chains overboard, got the said ship under sail, and succeeded in entering the port of *Sanzon*, which is situated to the north of *Point Bœuf* on the *French* coast, and is a tidal harbour: where, by reason of its being then low water, the said ship took the ground. Whilst lying in the said harbour, and in consequence of the natural flux and reflux of the tide, the said ship floated about eight days only in the month, and then only at the top of spring tides. By reason of the wind being contrary, the said ship got nieped, and was therefore unable to leave the said harbour until the 10th day of *May* in the same year, when she proceeded to sea, and was then found to make water in consequence of her having been so long on the ground, and of being thereby strained, so that it became necessary to keep the pumps going. The said ship reached the *Dublin River*, on the 21st day of *May* in the same year; and her cargo was then found to be damaged.

The question for the opinion of the Court is, whether the said ship was stranded in the harbour of *Sanzon*. If the Court shall be of opinion in the negative thereof, then the plaintiff agrees that a judgment shall and may be entered against him of nolle prosequi immediately after the decision of this case, or otherwise, as the Court may think fit; but, if the Court shall be of a contrary opinion, then the defendant agrees that judgment shall be entered against him, by confession, for 154*l.* damages, immediately after the decision of this case, or otherwise, as the Court may think fit, and that judgment shall be entered accordingly.

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Bovill, for the plaintiffs. The question is, whether what took place is to be considered a stranding within the meaning of the word in the usual memorandum. The principle laid down in the authorities is, that, when the vessel takes the ground in such a manner that the underwriters must have contemplated that in the ordinary course of navigation the vessel would so take the ground, it is no stranding; *Hearne v. Edmunds* (a), *Kingsford v. Marshall* (b). But, where the taking of the ground is out of the ordinary course, it is a stranding. And slight circumstances out of the ordinary course will make the difference. In *Barrow v. Bell* (c) the vessel was, when in harbour, drawn on the mud where vessels sometimes lay: this was done, not in the ordinary course of navigation, but because the vessel, having sprung a leak, was in danger of sinking at her moorings. That was held a stranding. *Abbott C. J.* there says: "I cannot distinguish this from the case of a ship on the high seas, in danger of being wrecked by a storm, and on that account allowed to be driven by the sails and rudder upon the beach of the main ocean." And *Bayley J.* says: "The ship in this case was laid on the strand, not in the ordinary course of navigation, but, *ex necessitate*, to avoid an impending danger." These expressions are very applicable to the present case: the master takes the ship into the harbour, not in the ordinary course of his voyage, but "*ex necessitate*, to avoid an impending danger;" and this is done at a time of the tide when no one would enter the harbour in the ordinary course of navigation, and the ground is taken in doing so. The cases are very uniform in principle as to what

(a) 1 B. & B. 388.

(b) 8 Bing. 458.

(c) 4 B. & C. 736.

constitutes and what does not constitute a stranding: the difficulty has always been in the application to the facts. The test is, whether it was in the ordinary course of navigation or not; *Bishop v. Pentland* (a), *Wells v. Hopwood* (b). In that last case *Parke* J. differed from the rest of the Court; but this was a difference, not as to the principle of law, but as to its application. He defines stranding to be "a grounding different from that which ordinarily and usually occurs to vessels navigating tide rivers and harbours." It can hardly be said that in the present case the ship, which was dragging her anchors, and for the preservation of the ship and cargo and the lives of the crew ran into a tidal harbour at low water, and consequently took the ground, took it in the ordinary and usual way in which vessels navigate tide harbours. The last case on the subject is *Magnus v. Buttemer* (c). [*Crompton* J. In that case the vessel took the ground in the harbour for which she was destined from the beginning, exactly as was intended.]

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Sir *F. Thesiger*, contra. There is no dispute as to the general principle. The question really is, What is meant by the ordinary course of navigation in the rule as laid down in the authorities. It is not material that *Sanzon* was not the port of the ship's destination. It is quite in the ordinary course of navigation that a vessel should be driven to take refuge in a tidal harbour out of her course. Hundreds of vessels every year are driven into the harbour of refuge at *Ramsgate*; and, as that is a tidal harbour, they must in general take the ground. It would be very strong to say that a grounding in

(a) 7 B. & C. 219.

(b) 3 B. & Ad. 20.

(c) 21 L. J. N. S. C. P. 119.

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Ramsgate Harbour is a stranding within the memorandum. Nor is it material whether the ship takes the ground in going into a tidal harbour, or after she is in, provided the grounding is in a place where in the ordinary course she would float at high tide and ground at low water; *Hearne v. Edmunds* (a). All that was done here was that at low tide the captain put the ship on the ground at a spot where, if it had been high water, she would have floated, and have afterwards taken the ground at ebb in the ordinary course. In those cases in which a ship, taking the ground in a tidal harbour, has been held to be stranded some accident has happened. In *Bishop v. Pentland* (b) and *Wells v. Hopwood* (c) a rope gave way. In *Barrow v. Bell* (d) the taking the ground was in consequence of the ship having struck upon an anchor. In *Carruthers v. Sydebotham* (e) the vessel fell over on her side. In *Rayner v. Godmond* (g) the grounding was from drawing off the water, which was not in the natural course of the navigation. But in the present case the ship, in the natural course of navigation, was compelled to take refuge in a tidal harbour. That she entered the harbour at ebb tide can make no difference.

Bovill, in reply. No case has been cited which lays down a different principle from that laid down in *Wells v. Hopwood* (c). [Lord Campbell C. J. All the cases, with the exception of *Baring v. Henkle* (h), concur. The authority of that case must be considered to be very questionable.] The distinction is not between

(a) 1 B. & B. 388.

(b) 7 B. & C. 219.

(c) 3 B. & Ad. 20.

(d) 4 B. & C. 736.

(e) 4 M. & S. 77.

(g) 5 B. & Ald. 225.

(h) 1 Marsh. Ins. 232.

natural causes and accidents. Nothing is more natural than that a ship should be driven on shore by the storms. The question is, whether it was in the ordinary and contemplated course of the voyage. In *Hearne v. Edmunds* (a) the ship took the ground, which was, it appeared, the usual course of navigation for vessels going up the river where the event occurred.

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Lord CAMPBELL C. J. I am of opinion that this was a stranding within the meaning of the memorandum. We have excellent guides, both as to what circumstances constitute a stranding, and as to what do not. Lord *Tenterden*, in *Wells v. Hopwood* (b), says that a rule may be fairly collected from the cases: and he goes on: "And that rule I conceive to be this: where a vessel takes the ground in the ordinary and usual course of navigation and management in a tide river or harbour, upon the ebbing of the tide, or from natural deficiency of water, so that she may float again upon the flow or tide or increase of water, such an event shall not be considered a stranding within the sense of the memorandum." And *Tindal* C. J., in delivering the judgment of the Common Pleas in *Kingsford v. Marshall* (c), after saying in substance the same thing as Lord *Tenterden*, goes on: "What more, then, is necessary? We think a stranding cannot be better defined, than it has often been in several of the decided cases, viz. where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which the ship is engaged, either wholly or in part, but from some

(a) 1 B. & B. 388.

(b) 3 B. & Ad. 34.

(c) 8 Bing. 464.

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accidental or extraneous cause." Now, in the present case, can it be said that the vessel took the ground, in the ordinary course of management in a tidal harbour, from those natural causes which are necessarily incident to the ordinary course of navigation, and not from some accidental or extraneous cause? Let us see what are the facts. The vessel is in danger; she is dragging her anchors; and the master finds it necessary to slip his chains and run for a place of safety, which happens to be a tidal harbour. Now, if under these circumstances she had taken the ground on a mud bank at the entrance of and outside the harbour, there can be no doubt it would have been a stranding. Can it make any difference that the bank was inside the harbour? The vessel never was inside the harbour in safety, so as to take the ground afterwards in the ordinary course of navigation in a tidal harbour; but she was forced by the perils of the sea to enter the harbour at low tide in an unusual and extraordinary manner, and in so doing took the ground. In one sense this was from natural and ordinary causes; for in one sense all perils are natural and ordinary. Storms and tempests are in the ordinary course of Nature. But the cause of the grounding was not in the ordinary and natural course of the navigation and management of the vessel. It was from an unusual and extraordinary peril that she was forced to enter the harbour at this time of tide: and I can see no difference between the case of the ship being forced, for her safety, to run aground outside the harbour, and her being forced to enter the harbour in such a state of tide that she runs aground in doing so. With the exception of *B. ing v. Henkle (a)*, all the cases concur in laying down one

(a) 1 *Marsh. Ins.* 232.

rule which we are now to apply. In doing so we cannot dismiss from our minds the storm and the perilous state of the vessel before she entered. But for these, the vessel would not in the ordinary course have entered the harbour at that time of tide or taken the ground as she did.

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COLERIDGE J. I am of the same opinion. It is clear, both on principle and authority, that the word stranding in the memorandum cannot extend to such takings of the ground as are from the first intended to take place in the course of the voyage. To construe it as extending to what is known by all parties to be intended and expected to take place, in the ordinary course of a voyage, would render the memorandum nugatory, and would be absurd. But it does extend to taking the ground in an extraordinary manner, or by accident. In *Bishop v. Pentland* (a) and *Wells v. Hopwood* (b) the vessels had safely reached the place where they were intended to take the ground in the ordinary course; but both vessels were held to be stranded, because they took the ground in a different way on account of an extraordinary accident. In the one case, the accident was that a rope broke; in the other, that a rope stretched. In the present case, the vessel never had been safely brought to the place where she was to take the ground. Had she entered the harbour at high water, and then afterwards been permitted to ground where she did in the ordinary way in such a harbour, I think Sir *Frederick Thesiger's* argument might prevail. But, as the facts are, it seems to me that, unless we are prepared to lay

(a) 7 B. & C. 219.

(b) 3 B. & Ad. 20.

1853. down the rule that there can be no stranding in a tidal harbour, if the vessel has entered the harbour and grounded on a spot where, had it been high tide, she would have floated, we must decide for the plaintiff.

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WIGHTMAN J. The question, what constitutes a stranding, has been often discussed, and the principles explained by many eminent authorities, who with one exception agree. I adopt the language of my Lord *Tenterden* in *Wells v. Hopwood* (a), which clearly expresses the principles. (His Lordship then read the passage previously read by Lord *Campbell* C. J., ante, p. 461.) Now in that passage Lord *Tenterden* tells us what is not a stranding. Let us apply that to the present case, and see if the vessel took the ground in the ordinary and usual course of navigation and management in this tide harbour, upon the ebbing of the tide, so that she might float again upon the flowing. The vessel was at anchor, the storm increased; and then, the case tells us, "the large anchor dragged; and, in consequence thereof, and after consulting with the officers and crew, for the preservation of the ship and cargo and of the lives of all on board, and particularly with the purpose of preventing the said ship from going on shore, the captain slipped his two chains overboard, got the said ship under sail, and succeeded in entering the port of *Sanzon*, which is situated to the north of *Point Bœuf* on the *French* coast, and is a tidal harbour: where, by reason of its being then low water, the said ship took the ground." I certainly think, on this statement, that the ship took the ground by no means in the

(a) 3 B. & Ad. 34.

ordinary and usual course of navigation and management in a tide harbour, but that, from unusual peril, she was driven to enter at an unusual time of tide, and took the ground in the first instance. Lord *Tenterden* proceeds to consider when the taking of the ground shall be a stranding: he says: "But where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event shall be considered a stranding within the sense of the memorandum." That seems directly applicable to the present case: for the time of entering the harbour was at an unusual time of tide; and she took the ground at once, instead of being allowed by the ebb of the tide to take the ground afterwards. These were, I think, extraordinary circumstances of time and place, within Lord *Tenterden's* meaning: and consequently this vessel was stranded.

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CROMPTON J. concurred.

Judgment for plaintiffs.

The Overseers of BODENHAM, Appellants *against*
The Overseers of SAINT ANDREWS, WOR-
CESTER Respondents.

Wednesday,
January 19th.

TWO justices of the peace for the county of *Hereford*
made an order for the removal of *Amelia Preece*,

A bastard,
born since the
passing of stat.
4 & 5 W. 4.
c. 76., attaining

the age of sixteen without having acquired any settlement of its own, is settled in the place of its birth, though the mother is settled elsewhere, and the bastard, till sixteen, had and followed the mother's settlement. Per Lord *Campbell C. J.*, *Coleridge* and *Wightman Js.*; dubitante *Crompton J.*

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single woman, and her illegitimate child *Elizabeth*, from the parish of *Bodenham* in the county of *Hereford*, to the parish of *Saint Andrews* in the city of *Worcester*. The overseers of *Saint Andrews* gave notice of appeal to the Sessions: and thereupon a case was stated for the opinion of this Court, by consent and by order of a Judge, under stat. 12 & 13 *Vict. c. 45. s. 11.*: which was as follows.

“ The pauper, *Amelia Preece*, was born in the appellant parish of *Saint Andrews*, on the 14th day of *September* 1834. She was the bastard child of one *Susan Preece*. *Susan Preece*, in 1836, married one *William Norman*. Neither *Susan Preece* nor *William Norman* had ever any settlement in the appellant parish of *Saint Andrews*, but have always had, and now have, respectively, a settlement elsewhere.

The respondents contend that, having been born a bastard in the appellant parish, that parish is the pauper's place of legal settlement; and that, having attained the age of sixteen years in *September* 1850, she, thenceforth, no longer had her mother's settlement, wherever it might be, but from that time was legally removable to the appellant parish.

The appellants contend that the facts above stated shew that the pauper never was settled in the appellant parish. That, under stat. 4 & 5 *W. 4. c. 76. s. 71.*, the pauper was, at her birth, settled in the parish, which was the then settlement of her mother *Susan Preece*; and that the pauper followed, and still retains, the settlement which her mother the said *Susan Preece* gained by her marriage with the said *William Norman*.

If the Court should be of opinion that the pauper had and followed her mother's settlement, only till she

attained the age of sixteen years, and that, on attaining that age, she was legally removable to the appellant parish by reason of her birth there, the order of removal is to be confirmed: otherwise it is to be quashed."

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W. H. Cooke, in support of the order. 'The question depends on the construction of stat. 4 & 5 *W. 4. c. 76. s. 71.*, by which it is enacted "that every child which shall be born a bastard after the passing of this Act shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen, or shall acquire a settlement in its own right, and such mother, so long as she shall be unmarried or a widow, shall be bound to maintain such child as a part of her family until such child shall attain the age of sixteen; and all relief granted to such child while under the age of sixteen shall be considered as granted to such mother." Before that enactment, the child was settled in the place of its birth; but, though during the age of nurture it could not be separated from the mother, the parish where the child was born was, unquestionably, liable to maintain it as soon as nurture ceased. Stat. 4 & 5 *W. 4. c. 76. s. 71.* seems to have been passed to put an end to all disputes as to what was the age of nurture, which it enacts, in effect, shall be sixteen, and, also, to meet an evil which then existed, namely that, if the child, though under the age of nurture, was separated from its mother, it must have been removed, not to the place of the mother's residence or settlement, but to the place of its own birth. To meet that evil, and prevent the separation of mother and child, the Legislature say that the child shall "have and follow" the mother's settlement, till the child attains sixteen. There was no object to be

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gained by altering the settlement after sixteen; and, accordingly, the Legislature leaves the settlement after sixteen untouched. It is therefore the birth settlement as it was before.

Selfe, contra. The object of the Legislature seems to have been to place the child of an unmarried woman in the same position that the legitimate child of a widow would be in. Till emancipation, the legitimate child has and follows the settlement of its parent. The statute enacts that a bastard shall have and follow the settlement of its mother in the same way. Attaining the age of sixteen, or acquiring another settlement, are made equivalent to emancipation. [*Coleridge* J. In order to give it that meaning, you are obliged to invert the words.] The only thing required is to read the words "until such child shall attain the age of sixteen, or shall acquire a settlement in its own right," as overriding the word "follow," but not overriding the word "have."

LORD CAMPBELL C. J. This seems to me a very plain case. Before stat. 4 & 5 W. 4. c. 76. s. 71., the place of the birth of a bastard was the place of its settlement; but the child could not be separated from its mother during the age of nurture: that being the state of the law, then comes this enactment, the object of which, Mr. *Selfe* says, is to change the place of settlement from that of the birth of the child to that of the mother's settlement, whatever it may be. If such was the intention, the language is not adequate to carry it out; for the enactment says that the child "shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen." When the child

has attained sixteen, what is to happen? The words "until such child shall attain the age of sixteen" override the whole sentence: the child is to have the mother's settlement until the child attains sixteen, and to follow it until the child attains sixteen: when the child has attained sixteen, it is to be as if the enactment had not been passed. The object seems to have been to put an end to all disputes as to the time when the mother and child might be severed and removed to different places. That is, in no case, to be, until the child has attained sixteen, unless the child has acquired a settlement of its own. When the child has attained sixteen, the enactment ceases to apply, and the settlement of the child is, as it was before the Act, the birth place of the child. This is a novelty to some extent; for it is not a settlement which exists though the power to remove to it remains for a time suspended, but a settlement given for a certain time, which on the expiry of that time ceases, and the child becomes settled in and removeable to its birth place.

COLERIDGE J. I am of the same opinion. I think it very necessary to give the words of the statute their ordinary grammatical meaning. Now there is no doubt that grammatically the words "until such child shall attain the age of sixteen" qualify the word "have" as well as the word "follow." Nor, on that construction, is the word "have" superfluous; for it may happen that, whilst the child is with the mother at her place of settlement and under sixteen, the mother may die; and then the word "have" would operate. Let us consider what the law was before the enactment. The place of birth determined the settlement of the bastard child; but, up

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to the termination of the period of nurture, that place was not liable to relieve the child because it was not severable from its mother. The Legislature seem to have intended to provide a new law, giving the child the same settlement as the mother up to sixteen: after sixteen the enactment is silent. Then the old law applies; and the settlement after sixteen is the place of birth as it would have been before. This is certainly the ordinary grammatical meaning of the words of the statute.

WIGHTMAN J. It appears to me that the object of the enactment was to substitute the mother's settlement for the birth settlement till the child attains sixteen, and no longer. Such a construction gives effect to all the words of the enactment. There are no words to shew an intention to take away the liability of the place of the birth after the child attains sixteen.

CROMPTON J. I was inclined to take a different view of the construction of this enactment: but I do not dissent from the construction put upon it by the rest of the Court, which certainly is in accordance with the literal and grammatical construction of the words.

Order confirmed.

Saturday,
January 20th.

THE General Rules of this term, respecting the examination, admission &c. of attorneys, to take effect from and after the first day of *Trinity* term next, are dated of this day (a).

(a) See post, Appendix, II., p. lvii.

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HAYLOCK *against* SPARKE.

TRESPASS vi et armis, for imprisoning defendant without reasonable and probable cause. Plea: Not guilty (by statute). Issue thereon.

On the trial, before *Pollock* C. B., at the last Summer assizes for *Cambridge*, it appeared that the defendant, who was a justice of the peace for the Isle of *Ely*, had, on 30th *April* 1852, committed the plaintiff to the House of Correction at *Ely*, in default of his finding sureties to keep the peace for three months. The warrant, which was put in by the plaintiff as part of his case, was as follows.

"Isle of *Ely*, to wit. To the constable of the parish of *Holy Trinity* in *Ely*, in the said Isle, and to the keeper of the house of correction at *Ely*, in the said Isle.

"Whereas *John Haylock*, of the parish of *Saint Mary* in *Ely* in the said Isle, farmer, hath this day been brought before me, the Revd. *John Henry Sparke*, clerk, one of Her Majesty's justices of the peace for the said Isle, charged, on the oath of *Thomas Palmer*, a porter in the employ of the Eastern Counties Railway Company, residing in " &c., "with having, about one o'clock in the morning of yesterday, written on the pavements in a lane called *Chapel Lane*, in the said parish of *Saint*

The notice (required by stat. 11 & 12 Vict. c. 44. s. 9.) of action against a justice of the peace for an act done by him in execution of his office, under an order, in a matter of which he has not jurisdiction, may be given before the quashing of the order; the act itself being the cause of action, and such cause of action being complete before the quashing, although the action itself, by sect. 2, cannot be brought until after the quashing. In an action for false imprisonment against the justice, if a warrant is put in by the plaintiff as his evidence, the defendant may use a recital

in it of an information on oath, in consequence of which the warrant was granted by him, as evidence of that fact.

A justice of the peace has jurisdiction to require sureties for good behaviour of a person charged before him upon information with having published a libel calculated to produce a breach of the peace; and, in default of such sureties, to commit the party so charged to prison. Therefore, under sect. 1, trespass vi et armis will not lie for such imprisonment.

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Mary, the following offensive words, reflecting on the character of Mr. *Robert Johnson Watt*, Station Master of the *Ely* Railway Station, (that is to say) ‘Donkey Watt, the Railway Jackass:’ and it having been stated to me, on the oath of the said *T. Palmer*, that the continued writing for some time past of these offensive words are (a) calculated to provoke a breach of the peace, and the said *Thomas Palmer* having prayed that the said *John Haylock* might be required to find sufficient sureties to keep the peace towards Her Majesty and all Her liege subjects: I therefore, the said justice, have ordered and adjudged, and do order and adjudge, that the said *John Haylock* shall enter into his recognizance in the sum of 30*l.*, with two sufficient sureties in the sum of 15*l.* each, to keep the peace towards Her Majesty and all Her liege people for the space of three calendar months now next ensuing: and, inasmuch as the said *John Haylock* hath refused to enter into such recognizance and find such sureties as aforesaid, I do hereby require and command you, the said constable, forthwith to convey the said *John Haylock* to the said house of correction, and to deliver him to the said keeper thereof there, together with this warrant. And I do require and command you, the said keeper, to receive the said *John Haylock* into your custody in the said House of Correction, and him there safely to keep for the space of three calendar months, unless he, in the mean time, enter into such recognizance with such sureties as aforesaid to keep the peace in the manner and for the term aforesaid. Herein fail not.

“ Given under my hand and seal, the 30th day of April, 1852.

J. H. SPARKE.”

(a) Sic.

On the 6th *May* 1852, plaintiff was brought up, by habeas corpus, before *Coleridge J.*, and discharged. On 18th *May*, plaintiff, under stat. 11 & 12 *Vict. c. 44. s. 9.*, caused a notice, dated the same day, to be served on defendant, stating that plaintiff would, "at or soon after the expiration of one calendar month from the time of" defendant "being served with such notice," commence an action against defendant. On 12th *June*, the warrant, having been brought up by certiorari, was quashed by the Court of Queen's Bench; and on 19th *June* the writ of summons in this action was issued. The defendant's counsel contended, upon these facts: 1. That defendant, in committing the plaintiff, had acted within his jurisdiction, and that, the declaration not being in case, and not averring malice, the action failed under stat. 11 & 12 *Vict. c. 44. s. 1.*; 2. That the warrant of commitment was good; 3. That, under stat. 11 & 12 *Vict. c. 44. s. 13.*, plaintiff could have a verdict only for 2*d.* without costs, as he had been proved to have been guilty of the offence of which he had been convicted, and had suffered no longer imprisonment than that assigned by law for such offence; 4. That, under the same statute, sect. 9, the notice of action was insufficient, not having been given after the cause of action was completed. The counsel for the plaintiff contended that these objections failed, even on the assumption that the facts were as suggested for the defence: and, further, as to the first point, that it was essential to the jurisdiction, at all events, that an information should have been preferred; and, as to the third, that it should have been shewn that the plaintiff had been guilty of the offence charged in the warrant, and had been convicted of such offence, none of which facts had been

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proved. The defendant's counsel relied on the warrant itself as evidence of the facts recited in it: but the Lord Chief Baron held, as to the first two points, that there was no jurisdiction and that the warrant was bad altogether: and, as to the third point, he thought the recitals not evidence. But he held the fourth objection fatal, and directed a verdict to be entered for defendant. He allowed, however, the damages to be assessed contingently, by consent; and he reserved leave to plaintiff to move to enter a verdict for the amount which should be assessed, and to the defendant to raise upon the argument on such rule the first three points insisted upon at the trial on his behalf. The jury assessed the damages at 42*l*.

O'Malley, in *Michaelmas* term 1852, obtained a rule *Nisi* to enter the verdict for 42*l*. In the same term (a),

Byles Serjt. and *Wells* shewed cause. First: as to the notice of action. The Lord Chief Baron's ruling was correct. The action was not maintainable till one calendar month had elapsed after the notice; and the notice could not be given before the cause of action was complete. Sect. 9 was passed to protect justices who might, in the execution of their office, have committed an act not within their jurisdiction. It enacts that no action shall be commenced against a justice of the peace for anything done by him in the execution of his office "until one calendar month at least after a notice in writing of such intended action shall have been delivered to him, or left for him at his usual place of abode, by the party intending to commence such action, or by his

(a) The argument was heard on 11th and 12th November, 1852, before Lord Campbell C. J., Coleridge and Erle Js., and on 13th November before Lord Campbell C. J., Wightman and Erle Js.

attorney or agent, in which said notice the cause of action, and the court in which the same is intended to be brought, shall be clearly and explicitly stated." It was intended to give the justice a month's time for the purpose of his tendering amends, before the action should be brought; and this intention would be defeated if notice of action could be given before the cause of action was complete; for, till the cause of action is complete, there is nothing for which amends can be tendered. Here the cause of action (the "act complained of," as it is called in sect. 8) was not complete until the warrant was quashed; for, by sect. 2, no action "shall be brought for anything done under such conviction or order until after such conviction shall have been quashed." [*Coleridge J.* Do you say that no cause of action existed here until the warrant was quashed?] The cause of action was at any rate suspended; there was no cause of action within the statute, so as to allow of notice being given. [*Lord Campbell C. J.* The quashing of the warrant can scarcely be called "the act complained of."] It is one of the elements which makes the entire transaction an act capable of being complained of. *Sabin v. De Burgh* (a), and other cases there cited, shew the strictness with which notices of this kind are to be construed.

Secondly: The defendant was entitled to the verdict upon the two points first made for him at the trial. These both depend on the question of jurisdiction. It is true that the Court, in quashing the commitment, has decided that the warrant itself is defective; but the defendant may still have acted within his jurisdiction:

(a) 2 *Campb.* 196.

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and, if so, the plaintiff should, under sect. 1, have averred malice. [Lord *Campbell* C. J. The informality of the warrant itself is not inconsistent with your present point.] In *Barton v. Bricknell* (a) it was decided that the quashing of a conviction for informality did not deprive the justice of the protection of the statute, where he had convicted for an offence within his general jurisdiction. [*Coleridge* J. There he had not put into execution the illegal alternative which was contained in the conviction itself, which was the only objection to the validity of the conviction.] In fact the defendant has here done nothing which was not within his jurisdiction. The warrant shews, upon the face of it, the publication of a libel by the plaintiff, and the fact of his being charged with it before the defendant. The warrant was put in by the plaintiff: the defendant, therefore, though he could not himself have made the recital in it evidence, may insist that all the contents of the document so put in are evidence, though not conclusive; *Baildon v. Walton* (b). The sheriff's warrant to his bailiff, under a ca. sa., is some evidence of the ca. sa. which it recites; *Bessey v. Windham* (c). That case, it will be said, is overruled by *White v. Morris* (d): but in *White v. Morris* (d) the decision proceeded on the ground that the evidence was given on a question between the officer and a stranger. The commitment here furnishes evidence also of a representation, by the informant, that such libel was calculated to produce a breach of the peace. The defendant had, under those circumstances, a right, as justice of the peace, to call upon the plaintiff to find sureties to keep the peace,

(a) 13 Q. R. 393.

(b) 1 Exch. 617.

(c) 6 Q. B. 166.

(d) 21 L. J. N. S. C. P. 185.

and, on his not producing them, to commit him; 5 *Burn's Justice*, 1212, &c. (29th ed.), tit. *Surety for the good behaviour*, I. In *Dalton's Country Justice*, c. 124. (ed. 1742), it is said that for a libel the justice may require sureties for good behaviour; and good behaviour includes keeping the peace; *ib.* c. 123. The defendant, therefore, here acted strictly within his jurisdiction. In *Ratt v. Parkinson* (a) *Jervis* C. J. intimated an opinion that an excess of jurisdiction, to deprive a magistrate of the protection of sect. 1, must be not merely an irregular mode of carrying out an act which is within his jurisdiction, but the commission of an act which he could by no possibility have a legal right to do. But in the present case there is nothing irregular even in the warrant itself. It was contended for the plaintiff that the defendant had sent the plaintiff to prison for doing something which the warrant did not allege him to have done, inasmuch as the warrant, after stating that the defendant had written the words, attributes the danger of a breach of the peace to the continued writing, which it does not impute to the plaintiff. But the defendant, in fact, did not commit the plaintiff for publishing the libel, but simply for refusing to find sureties for the peace, which the defendant (as has been shewn) had power to demand of him, under the whole circumstances that were brought forward. If the recital upon which this objection is supposed to arise be struck out of the warrant altogether, the warrant still contains enough, on the face of it, to give the defendant jurisdiction to do what he did: that being so, the Court will not enter into the question, whether

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(a) 20 *L. J. N. S. M. C.* 208 (in *Com. Pleas*).

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his decision upon the facts was correct or not; *Rex v. Tregarthen* (a). [Lord Campbell C. J. The power of a justice to call for sureties to keep the peace is very extensive. Threatening words are sufficient grounds for his doing so.] It is expressly laid down by Abbott C. J., in *Willes v. Bridger* (b), that a justice has this jurisdiction. He there says: "The authority of a justice of the peace to require, upon due complaint made to him in his judicial character, sureties for the keeping of the peace, and to commit a person to prison for want of such sureties, is not nor could be denied." The defendant, therefore, was clearly entitled to protection under sect. 1.

Thirdly; the defendant was liable only to nominal damages, under sect. 13. That enacts, among other things, that, if the plaintiff seeks to recover damages for imprisonment under a conviction, he shall not be entitled to recover any sum beyond two pence as damages for such imprisonment, if it shall be proved that he was actually guilty of the offence of which he was so convicted, and that he had undergone no greater punishment than that assigned by law for the offence of which he was so convicted. Here the plaintiff has been guilty of contumacy in not finding sureties to keep the peace; and that contumacy was the ground of his being committed; and such commitment is in the nature of a conviction. And the defendant has not undergone a greater punishment than that assigned by law for such contumacy. [Lord Campbell C. J. Would the refusal to find sureties be an offence within the meaning of the

(a) 5 B. & Ad. 678.

(b) 2 B. & Ald. 278.

statute ?] There may be a difficulty in supporting such a construction.

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O'Malley, Couch and Prentice, contra. First, as to the question of jurisdiction. *Ratt v. Parkinson* (a) is not in point. There the Court decided that all the proceedings were right in substance. That is not so here. Even supposing that a justice has power to bind a man over to keep the peace on account of his having published a libel, there is no proof that there was any information before the defendant with respect to the libel in question at the time of his issuing the warrant. The warrant itself is no evidence as to that point. It does not amount to a conviction; it is at the most but a mere justice's order, and therefore requires evidence aliunde to support it. But, even supposing it to amount to a conviction, it is no evidence; for, though a subsisting conviction is conclusive as to the adequacy of the jurisdiction which it imports upon the face of it, a conviction which has been quashed is no evidence at all as to that point; it is no longer the formal record of the proceedings before the magistrate; *Paley on Convictions*, p. 317 (3rd ed.). The onus of proof with respect to jurisdiction lies on the defendant. The proof of jurisdiction is one of the special matters which must be given by the defendant in evidence under the statutory plea of Not Guilty. If he had not been entitled to that form of plea, he must have pleaded it specially, and at the trial have proved the plea, either by the production of a good subsisting conviction or evidence aliunde; and the

(a) 20 L. J. N. S. M. C. 208.

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statutory plea, though it alters the mode of pleading such a defence, does not shift the onus of proof. Here the defendant produced neither a subsisting conviction, nor evidence aliunde; he offered only a warrant of commitment, and that a quashed one. In *Stevens v. Clark* (a) *Cresswell* J. held that even a good warrant of commitment was no evidence of an information on oath recited in it. *Bessey v. Windham* (b) is at variance with all the other cases, and, limited as the decision is, is treated as incorrect by all the Court in *White v. Morris* (c). A warrant, in fact, is not evidence of what has been done, but only of what is to be done. It is therefore no evidence of an information recited in it, which is antecedent to the act directed by the warrant. [Lord Campbell C. J. You say there was no evidence of any information. But may not a magistrate act upon his view alone? If a warrant recites that, in the view of the magistrate, the offence in respect of which the commitment is made is likely to produce a breach of the peace, surely the warrant is evidence of that view.] That may be so, where the warrant exists in its integrity at the time of its production as evidence. But here the warrant does not subsist; and there is not, therefore, evidence even of the magistrate's own view. [Lord Campbell C. J. In *White v. Morris* (c) I think the fact to be proved was not within the knowledge of the defendant.] That point does not affect the principle of the doctrine, and was not brought forward in the judgment of the Court. The decision in *White v. Morris* (c), as regards the admission of the recital in the warrant as evidence of the writ, is

(a) 2 Moo. & R. 435.

(b) 6 Q. B. 166.

(c) 21 L. J. N. S. C. P. 185.

similar to that in *Glave v. Wentworth* (a). [Lord Campbell C. J. The doctrine in *White v. Morris* (b) seems to have been laid down with some qualification by Lord Mansfield in *Martin v. Podger* (c).] It is attempted to make the warrant evidence of all that it recites, on the ground of its having been put in by the plaintiffs. But that argument is applicable only in cases where the party putting in the evidence uses it as proof of the truth of something asserted in it: here the plaintiff uses it only to bring home the act to the defendant. If, then, the warrant is no evidence, the defendant has failed to shew jurisdiction, and is not entitled to the protection of the statute. *Barton v. Bricknell* (d), cited on the other side, is an authority against the defendant; for it was there clearly intimated by the Court that, had the defendant caused to be carried out that alternative in the warrant which he had no jurisdiction to direct, he would not have been protected by the statute. *Leary v. Patrick* (e) is an authority to the same effect: the magistrate was there held to have exceeded his jurisdiction because he had committed for non-payment of costs, when no costs had been adjudged; and this, whether there was or was not jurisdiction to adjudge costs. Moreover, the defendant, in calling upon the plaintiff to find sureties to keep the peace, has been guilty either of irregularity or of an excess of jurisdiction. If, as is contended on the other side, the Court are to construe sureties to keep the peace as sureties for good behaviour, he has been guilty of an excess of jurisdiction; for a magistrate cannot bind over libellers

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(a) 6 Q. B. note (b) 173.

(b) 21 L. J. N. S. C. P. 185.

(c) 2 W. Bl. 701.

(d) 13 Q. B. 393.

(e) 15 Q. B. 266.

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to good behaviour. [*Erle J.* He can bind over to good behaviour for quarrelsome words tending to a breach of the peace.] *Dalton* is the only authority that goes so far as that. [*Erle J.* referred to *Rex v. Hart (a)*.] In 2 *Hawk. Pl. Cr.* 3, 13 (7th ed.), B. I. cc. 60, 61, the distinction between the two kinds of binding over is pointed out. The obligation to be of good behaviour is by far the more extensive; 14 *Vin. Abr.* 22, tit. *Good Behaviour* (B), (B. 2); 7 *Bac. Abr.* 515 &c. (7th ed.), tit. *Surety of the Good Behaviour* (A), (B); 4 *Bl. Comm.* 255. Stat. 60 G. 3 & 1 G. 4. c. 9. s. 16. gave power to justices of the peace, in particular cases of libel, to bind over to good behaviour; that is strong evidence that the general power to do so in cases of libel does not exist. And, wherever the magistrate binds over to good behaviour, the fact upon which he acts ought to be positively found by him; *Rudyard's Case (b)*. If, on the other hand, what the defendant did was to bind the plaintiff over to keep the peace only, he was exceeding his jurisdiction; for he could do so only upon complaint of bodily fear made to him by a third party. [Lord *Campbell C. J.* The complaint of bodily fear, *ipsissima verba*, is not necessary.] There must be words to that effect; 5 *Burn's Justice*, p. 1214. In *Regina v. Dunn (c)* Lord *Denman*, in giving judgment, says: "if one person informs the Court, or a justice of the peace, that he goes in fear and in danger of personal violence from another by reason of threats employed by him, and prays the protection of sureties of the peace, that protection may

(a) 30 *How. St. Tr.* 1131, 1194, 1344; *Lords' Journals*, vol. 47, p. 271; 12 *Q. B.* 1041, note (a).

(b) 2 *Fent.* 22.

(c) 12 *A. & E.* 599, 617.

be granted. Unless such a case appear, no jurisdiction appears." Here there is no evidence of any such complaint having been made before the defendant; in fact, it is but seldom that a libel can be made the ground of a complaint of bodily fear; and *Rex v. Wilkes* (a) is an authority against the right of a magistrate to require sureties of the peace where the cause of complaint is a libel. [Lord Campbell C. J. That case has been expressly overruled.] A magistrate may, no doubt, bind over to keep the peace any person who has been found guilty of a libel, but not a person who is merely charged with that offence. At all events, as *Regina v. Dunn* (b) shews, the libel must be in the form of a threat.

The point as to the notice of action appears to be disposed of by what has fallen from the Bench. The notice must be of a cause of action existing: but the cause exists before the conviction is quashed: the quashing of the conviction merely leaves the original tort unprotected. The language of the statutes of limitation is that, after the limited time, no action shall be brought: but the cause of action exists after the time of limitation, though the remedy is barred; and the same distinction is established as to the non-delivery of an attorney's bill; *Lester v. Lazarus* (c), *Harrison v. Turner* (d).

Cur. adv. vult.

LORD CAMPBELL C. J., in this term (January 27th), delivered the judgment of the Court.

(a) 2 *Wils.* 151.

(b) 12 *A. & E.* 599.

(c) 2 *C. M. & R.* 665.

(d) 10 *Q. B.* 482.

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In this case we are of opinion that the notice of action was sufficient, although given before the warrant of commitment was quashed. Supposing this warrant to be in the nature of a conviction, so that the action could not have been maintained unless the warrant had been quashed, we think that the notice of action was regularly given on the 18th of *May*. The quashing of the warrant was no part of the cause of action; and, before the warrant was quashed, all the requisites of the notice of action enumerated in sect. 9 of stat. 11 & 12 *Vict. c. 44.* might be and were complied with. If, in the case of a conviction, the magistrate receives such a notice before the conviction is quashed, he may at his peril rely upon the validity of the conviction, and abstain from tendering amends: but, if he does so, and the conviction is quashed, the action may be commenced against him one calendar month after the service of the notice. Were not this so, the party injured might be barred of his remedy altogether; for, by sect. 8 of the same statute, the action must be commenced "within six calendar months next after the act complained of shall have been committed." In argument it was contended that the six months might be construed to run from the quashing of the conviction; but the *commitment* is the *act complained of*, not the *quashing of the conviction* on the application of the party imprisoned. The quashing of the conviction is only a condition to the prosecution of the action, like the delivery of an attorney's bill, or the giving a notice of action: and there is nothing to determine in what order the conditions shall be complied with.

We have next to consider a much more difficult question: whether, upon the evidence, the defendant is

to be taken to have done an act "in a matter of which by law he has not jurisdiction, or in which he" "exceeded his jurisdiction." We are of opinion that the warrant put in by the plaintiff was evidence for the defendant of the information on oath before him recited in it. Without considering whether, since the case of *White v. Morris* (a), *Bessey v. Windham* (b) can be supported to its full extent, we think that, as the information was a fact within the defendant's knowledge, and the foundation of his act in granting the warrant of commitment, the recital of it must be considered part of the warrant, and admissible evidence for the defendant, when the warrant was produced against him by the plaintiff, for the purpose of shewing on what grounds, and in relation to what subject matter, he was acting when he granted it; in the same manner as, if a magistrate were to commit for a felony on his own view, the warrant reciting that he had seen the felony committed, when put in evidence against him, would be admissible evidence for him that he had seen the felony committed. The warrant being held admissible, and it appearing therefrom that sureties of the peace were required by reason of a charge of libel, it remains to be considered whether that is a matter in which the defendant as justice of the peace has jurisdiction within the meaning of stat. 11 & 12 *Vict. c. 44*.

We do not refer to the cases relating to articles of the peace exhibited by a complainant, as these are subject to regulations different from those which prevail in respect of sureties for good behaviour required by a magistrate

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(a) 21 *L. J. N. S. C. P.* 185.(b) 6 *Q. B.* 166.

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for the sake of the public. The latter is, in our opinion, the jurisdiction which the defendant intended to exercise, although sureties for the peace are mentioned. The law upon this subject begins with stat. 34 *Ed.* 3. c. 1., by which justices of the peace were first appointed. This statute, entrusting these magistrates with a wide discretion, authorizes them "to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people." In 4 *Inst.* 181, Lord *Coke*, remarking upon this clause, says that, the offences against the peace after they are done having been provided for, "now followeth an express authority given to the justices, for the prevention of such offences before they be done, viz. and to take of all them that be not of good fame, (that is, that be defamed and justly suspected that they intend to break the peace,) where they shall be found sufficient surety and mainprise of their good behaviour towards the King and his people (which must concern the King's peace, as is also provided by the word subsequent) to the intent that the people be not by such rioters troubled or indamaged, nor the peace blemished, nor merchants nor others passing by the highways, disturbed, nor put in the peril that may happen of such offenders." In *Bagg's Case* (a) the question whether insulting language to the mayor of a borough was ground for disfranchising an alderman was decided in the negative: but it is there said: "words of contempt, or *contra bonos mores*, although they be against the chief officer, or his brethren, are good causes

(a) 11 *Rep.* 93 b. 98 a.

to punish him, as to commit till he has found good sureties of his good behaviour, but not to disfranchise him." In *Stampe v. Hyde* (a) one question was, whether calling another a knave was a breach of a recognizance of good behaviour. The Court held that it was not; and a case is cited there, where a person, having been committed for not finding sureties for good behaviour, for calling an alderman a knave, was discharged, such a word alone not being sufficient. It appears, from these and other cases turning upon similar words, that aggravated defamation was a ground for requiring sureties for good behaviour, although rash words of anger were not sufficient.

In 2 *Hawk. Pl. Cr.* 14 (7th ed.), B. I. c. 61. ss. 3, 4, the learned author says: "it seems the better opinion, that no one ought to be bound to the good behaviour for any rash, quarrelsome, or unmannerly words, unless they either directly tend to a breach of the peace, or to scandalise the government." "However, I" "am inclined to think, that he" (the magistrate) "has a discretionary power to take such surety of all those whom he shall have just cause to suspect to be dangerous, quarrelsome, or scandalous." So in *Com. Dig. Forceable Entry* (D 25.) it is said that sureties for good behaviour may be required of all not of good fame "if he does that which tends to the breach of the peace;" and libellers are specified among the classes from whom such sureties may lawfully be required. For this *Dalton* is cited, c. 124. (b), where it is said that "libellers also may be bound to their good behaviour, as disturbers of the peace, whether they be

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(a) 2 *Roll. R.* 199, 227 (printed 247). See *Stampe v. Jenkin & Hyde*, 2 *Roll. Rep.* 271 (bis).

(b) Ed. 1742.

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the contrivers, the procurers, or the publishers of the libel: for such libels and defamation tendeth to the raising quarrels and effusion of blood." Against these authorities are two cases before *Pratt C. J.*; *Rex v. Shuckburgh* (a) and *Rex v. Wilkes* (b). In the first it is doubted whether sureties could be required from a libeller; and in the second it is declared that it was not lawful. But in both cases the prisoners were brought into the Court of Common Pleas under a warrant from the Secretary of State, the question being raised whether a Secretary of State is a conservator of the peace; and the observations may be confined to those warrants, without having any reference to the power given to justices of the peace under stat. 34 *Ed. 3. c. 1.* In *Butt v. Conant* (c) a warrant of commitment for want of bail to answer an indictment for libel was held valid; and the authority of the eloquent dicta of Lord *Camden*, as applicable to justices of the peace, was denied.

Upon the whole, it appears to us that a justice of the peace has jurisdiction to require sureties for good behaviour in some cases of libel against private individuals. If that be true, the defendant had jurisdiction in the matter out of which this cause of action arises. And, though the proceedings were informal, and although there was in our opinion a great want of discretion in requiring sureties upon such an occasion, it follows that an action of trespass will not lie; and the verdict for the defendant must remain.

Rule discharged.

(a) 1 *Wils.* 29.

(b) 2 *Wils.* 151.

(c) 1 *B. & B.* 548.

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BESSELL *against* WILSON.

TRESPASS, vi et armis, for assaulting, beating and imprisoning plaintiff without reasonable or probable cause.

Plea, Not guilty (by statute). Issue thereon.

On the trial, before Lord *Campbell* C. J., at the *London* sittings after *Trinity* term 1852, the following facts appeared.

On 18th *September*, 1850, two informations were exhibited before an alderman of the city of *London*, on behalf of *William Dixon*. One information charged that *Dixon* was the registered proprietor of a new original design for an article of manufacture called a "ventilator," and that, within twelve calendar months last past, the present plaintiff did, without the licence or consent in writing of *Dixon*, apply the design to a ventilator, contrary to the form of the Act (6 & 7 *Vict.* c. 65. (a)). The other information was for selling a ventilator, being an article of manufacture to which the design had been applied.

Defendant, an alderman of *London*, convicted plaintiff for an alleged offence under the Copyright of Designs Act, 6 & 7 *Vict.* c. 65., adjudged him to pay a penalty, and, he not having paid it, afterwards summoned him to shew cause why he should not be committed in default of paying, and be further dealt with according to law. The plaintiff did not appear to the summons personally; but his counsel and attorney appeared. The justice refused to hear the case in

plaintiff's absence, and issued a warrant for the apprehension of the plaintiff, reciting the summons and plaintiff's neglect to appear, and directing his apprehension, to answer to the complaint, and be further dealt with according to law. The plaintiff, under this warrant, was apprehended and imprisoned. The conviction was afterwards quashed; and plaintiff brought an action for false imprisonment against defendant. Held:

1. That defendant was not protected by stat. 11 & 12 *Vict.* c. 44. s. 2., the summons to appear after the conviction not being the summons spoken of in that section, the non-appearance to which was to prevent the maintenance of an action.

2. That, even if the summons had been within the section, the appearance to it by counsel and attorney was sufficient, and the action was therefore maintainable.

(a) See sect. 6; and stat. 6 & 6 *Vict.* c. 100. s. 8.

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On 1st *October* 1850, the plaintiff was convicted, before the defendant, an alderman of the city of *London* (a), on each information; and was adjudged, on each, to forfeit to *Dixon* 30*l.*, besides 5*l.* costs. The defendant, being present, was personally served with orders to pay. He then said that proceedings would be taken to remove the convictions by certiorari.

On 10th *October* 1850, Mr. *Sidney*, alderman of the city of *London*, issued a summons of that date, directed to plaintiff, to the effect that a complaint had been made to the alderman by *Dixon's* agent, "that you, the said *John Bessell*, having been duly convicted in two penalties with costs, amounting together to the sum of 70*l.*, have neglected and refused to pay the same: these are therefore to command you, in Her Majesty's name, to be and appear on *Friday* the 11th day of *October* 1850, at twelve o'clock in the forenoon, at the *Guildhall* justice room in the city of *London*, before such justice or justices of the peace for the said city as may then be there, to answer to the said complaint, and to shew cause why such further proceedings as the law directs should not be had thereon, and to be further dealt with according to law."

On 11th *October* 1850, the counsel and attorney of the plaintiff appeared before Mr. *Sidney*, who, however, refused to proceed in the absence of the plaintiff; and a second summons was issued by Mr. *Sidney*, of which the mandatory part is as follows.

"These are therefore, in Her Majesty's name, to require you to be and appear on *Saturday* the 12th day of *October*, 1850, at two o'clock in the afternoon precisely, at the *Guildhall* justice room in the city of

(a) See stat. 11 & 12 *Vict. c.* 43, s. 34.

London, before such justice or justices of the peace for the said city as may then be there, to answer to the said complaint, and to shew cause why you should not be committed, in default of paying such sum, and to be further dealt with according to law."

This was served on the plaintiff personally.

On 12th *October* the defendant was the sitting alderman. The plaintiff did not appear; but his counsel and attorney appeared, and stated that an application was about to be made for two writs of certiorari. The defendant said that, unless one of the penalties should be paid by noon on the 14th *October*, he should order a warrant, which he had then signed, to be put in force against the plaintiff, and have him apprehended. On the 14th, the money not having been paid, the sitting alderman (Mr. *Hooper*) handed over the warrant to the officer, to be put in force.

The warrant was dated 12th *October* 1850, signed and sealed by defendant, and directed "To all and every the constables of the police force for the city of *London* and the liberties thereof, and to all other constables and peace officers in the said city of *London* and liberties." It recited that a complaint had been made before an alderman that plaintiff had unlawfully neglected and refused to pay two penalties with costs, and that a summons had been issued by the alderman, commanding plaintiff to appear at *Guildhall*, before such justice or justices as might be there, "to answer to the said complaint, and to be further dealt with according to law: and whereas the said *John Bessell* hath neglected to be or appear at the time and place appointed in and by the said summons, although it hath now been proved to me upon oath that the said summons was duly served upon the said *J. B.*: These are therefore to command you,

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in Her Majesty's name, forthwith to apprehend the said *J. B.*, and to bring him before me, or some other of Her Majesty's justices of peace in and for the said city, to answer to the said complaint, and to be further dealt with according to law." The plaintiff was apprehended under this warrant, and imprisoned (a). On 1st *November*, rules for two writs of certiorari having been obtained, the plaintiff was liberated on giving security to prosecute the writs of certiorari. The convictions were afterwards quashed, on the ground that the design was not within the statutes protecting the copyright of designs: and the present action was brought for the imprisonment.

The counsel for the defendant contended that, on these facts, the action was not maintainable, under stat. 11 & 12 *Vict. c. 44. s. 2.*, the plaintiff not having appeared according to the exigency of the summons. The Lord Chief Justice overruled the objection, giving leave to move to enter a verdict for the defendant. Verdict for plaintiff.

In *Michaelmas* term 1852, *Hugh Hill* obtained a rule *Nisi* to enter a verdict for the defendant. In this term (b),

O'Malley and *Lush* shewed cause. First: assuming that the summons in this case was a summons of the kind contemplated in sect. 2 of stat. 11 & 12 *Vict. c. 44.*, there was an appearance. What appearance is suffi-

(a) He was apprehended by the police force for the city of *London*, and, upon being put into custody, was searched; which, it was stated, was the invariable practice of the city police. Lord *Campbell* C. J., upon the motion for the rule mentioned in the text, very strongly reprobated the application of the practice to such a case.

(b) *January* 13th, 1853. Before Lord *Campbell* C. J., *Wightman* and *Crompton* Js.

cient, must depend upon the object of the summons. Here, by stat. 5 & 6 *Vict. c. 100. s. 8.* (the powers of which extend to the cases comprehended in stat. 6 & 7 *Vict. c. 65.*), the magistrate had power to order a distress, but none to imprison. Then stat. 11 & 12 *Vict. c. 43. s. 22.* would indeed have enabled the magistrate to commit for three months in case it had been returned, to a warrant of distress, that no sufficient goods could be found. But here it was not shewn that any warrant of distress had issued. The plaintiff could here be summoned only for the purpose of shewing cause why a distress warrant should not issue. For this purpose, the appearance of counsel or attorney was enough. In *Rex v. Simpson* (a) it was held that a party might be convicted for deer stealing, under stat. 3 & 4 *W. & M. c. 10.*, without appearing. There *Parker C. J.* said: "to require the offender to be brought before the justices and detained, will be a strange construction, for that detainer may be accounted a greater punishment than the forfeiture; and if in such a case the offender, to prevent further trouble, would send the forfeiture, why should not that be a sufficient authority for the justice to convict him, though he does not appear in person? To compel the offender to appear would be to no purpose; for if he does appear, the justices cannot compel him to make a defence." In *Rex v. Haddock* (b) it was held that a party, indicted of mayhem, need not be brought to the bar, but might deliver his plea in the office, the crime not then being one by which life and member were affected. An appearance of an infant by attorney, upon an information for riot, was held suffi-

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cient in *Regina v. Tanner* (a). Stat. 11 & 12 Vict. c. 43., which must be construed in connection with stat. 11 & 12 Vict. c. 44., recognizes, by sect. 13, the appearance by counsel or attorney before a justice. But, secondly, the summons here is not the kind of summons which is the subject of the enactment in sect. 2 of stat. 11 & 12 Vict. c. 44. That section contains provisos for three cases. First, where an act is done under a conviction, the conviction must be quashed before the action is brought. The act in the present case, however, is not properly an act done under a conviction; for the conviction imposes no imprisonment: and, further, the conviction has been quashed. Secondly, where the action is brought for any thing done under a warrant to procure appearance, and is followed by conviction, the conviction must be quashed. Here, even if the conviction had not been quashed, the provision would not apply; for this summons followed the conviction. Thirdly, where the warrant is on an information for an alleged indictable offence, still, if a summons has issued before the warrant, and been served, and the party summoned has not appeared, the action is not maintainable. It is sought to bring the present case within the last proviso. But it is manifest that the summons there spoken of is a summons in the nature of process to bring the party before the magistrate to answer the charge. Here the charge had been disposed of, and a conviction had taken place, before the summons issued. If the statute were otherwise interpreted, a magistrate might protect himself from responsibility for an illegal conviction by

(a) 2 *Ld. Raym.* 1284.

issuing a summons afterwards. The plaintiff would be worse off than if the magistrate had acted within his jurisdiction, and were protected only by sect. 1. [*Wightman* J. Should a warrant of distress issue without a summons?] It may: non-payment is enough to authorise it. At any rate, the non-appearance to such a summons is merely an abstaining from resisting it.

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Hugh Hill and *Willes* contra. This action is not maintainable under either sect. 1 or sect. 2 of stat. 11 & 12 *Vict. c. 44*. Under sect. 1, if the magistrate has jurisdiction, the action must be in case, with an allegation of malice. The action here is trespass: and it is said that the magistrate had no jurisdiction, and that the plaintiff in effect appeared to the summons. By common law there could be no appearance by attorney; the cases where there may be such appearance are to be found in *Com. Dig. Attorney* (B 4.), (B 5.), (B 6.) (a): but no authority is to be found for appearing by attorney to answer a complaint before justices. Stat. 6 & 7 *W. 4. c. 114. s. 2.*, for the first time, establishes the right of parties so charged to have the assistance of counsel and attorney; but that does not dispense with appearance. All that *Rex v. Simpson* (b) decided was that the party convicted could not there rely upon his own non-appearance as an objection to the conviction. *Rex v. Haddock* (c) related only to the mode of putting in a plea of Not Guilty. In *Regina v. Tanner* (d) it was not competent to the defendant to contend that he had

(a) See authorities in *Doe dem. Bennett v. Hale*, 15 Q. B. 171, and note to the same case, 15 Q. B. 225.

(b) 1 *Str.* 44.

(c) 2 *Str.* 1100.

(d) 2 *Ld. Raym.* 1284.

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appeared irregularly. Stat. 11 & 12 *Vict. c. 43. s. 12.* enables both parties to have the assistance of counsel and attorney: but that does not affect the question of appearance. Sect. 13 of the same statute applies to the particular proceeding there regulated: but it rather affords an opposite inference in cases which are not within that section. Here the magistrate, if not bound, was at any rate entitled to inquire, before issuing a warrant of distress, or of apprehension in default of goods to answer the distress, whether the plaintiff could shew cause against the proceeding. The principle appears from *Hammond v. Bendyshe* (a), where several authorities are cited; among others, *Ex parte Kinning* (b) and *Kinning's Case* (c), to which may be added *Kinning v. Buchanan* (d), and the doctrine laid down in the Exchequer Chamber in *Bonaker v. Evans* (e), and the language of Parke B. in *In re Hammersmith Rent-charge* (g).

Cur. adv. vult.

LORD CAMPBELL C. J., in this term (*January 19th*), delivered the judgment of the Court.

In this case the action is *prima facie* maintainable. The warrant granted by the defendant, under which the plaintiff was arrested and imprisoned, was illegal. The conviction had been quashed by this Court; and the defendant had clearly exceeded his jurisdiction in requiring the plaintiff to be apprehended and brought before him in custody to answer the complaint stated in the warrant.

(a) 13 Q. B. 869.

(c) 10 Q. B. 730.

(e) 16 Q. B. 162.

(b) 4 Com. B. 507.

(d) 8 Com. B. 271.

(g) 4 *Exch.* 87.

The defendant, pleading "Not guilty, by statute," relies for protection on stat. 11 & 12 *Vict. c. 44. s. 2.*, whereby it is enacted: that no action shall be brought against a justice "for any thing done under such conviction or order until after such conviction shall have been quashed;" "nor shall any such action be brought for any thing done under any such warrant which shall have been issued by such justice to procure the appearance of such party, and which shall have been followed by a conviction or order in the same matter, until after such conviction or order shall have been so quashed as aforesaid; or if such last mentioned warrant shall not have been followed by any such conviction or order, or if it be a warrant upon an information for an alleged indictable offence, nevertheless if a summons were issued previously to such warrant, and such summons were served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode, *and he did not appear according to the exigency of such summons*, in such case no such action shall be maintained against such justice for any thing done under such warrant."

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The defendant contends that, although this illegal warrant was not followed by any such conviction or order, a summons had been issued previously to such warrant, and such summons was duly served upon the plaintiff, and the plaintiff did not appear according to the exigency of such summons; therefore this action is not maintainable against the justice for the arrest and imprisonment under the warrant. But we are of opinion that, where there has been a conviction by the justice, the summons and warrant referred to by this enactment must be a summons and warrant before conviction, and

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that it does not apply to a summons and warrant after the conviction, issued with a view to the levying of the penalties. The warrant here, which was issued after the conviction, recites that *John Bessell* had unlawfully neglected and refused to pay two penalties with costs, directed to be paid by him, and that a summons had been issued commanding him to appear to answer to the said complaint, and that he had neglected to be or appear at the time and place appointed by the summons, although proof was given that the summons had been duly served. The warrant then concludes in these words: "These are therefore to command you, in Her Majesty's name, forthwith to apprehend the said *John Bessell*, and to bring him before me, or some other of Her Majesty's justices of the peace in and for the said City, to answer to the said complaint, and to be further dealt with according to law." Now this is not any proceeding pointed out by the preceding statute, 11 & 12 *Vict. c. 43.*, "To facilitate the performance of the duties of justices of the peace out of Sessions, within *England* and *Wales*, with respect to summary convictions and orders," or by any other statute, nor a proceeding which the Legislature could well have had in contemplation when it indemnified a justice for what was done under a warrant preceded by a summons to appear. Suppose it to be fitting that, after a conviction imposing penalties, the justice, before issuing a distress warrant to levy them, should issue a summons calling on the party convicted to answer a complaint that he had neglected and refused to pay them, it never could have been supposed that the justice, on a default to appear, instead of issuing a distress warrant, would issue a warrant to arrest and imprison

the party, and to bring him in custody before the justice to answer for not appearing. This is not a warrant granted by the justice to procure the appearance of the party with a view to a future conviction or order: and therefore there would be no indemnity to the justice for what was done under it, although a summons to appear had been previously served, even if the party had not appeared according to the exigency of such summons.

But we are further of opinion that, if the summons and warrant did come within the second section of stat. 11 & 12 *Vict. c. 44.*, it cannot be justly said that the party did not appear according to the exigency of the summons. The object of the summons must reasonably be taken to be that he might shew cause why a distress warrant should not issue. During the argument, there was a suggestion that distress warrants had before issued: but at the trial such prior distress warrants were not given in evidence, nor ever alluded to. At the time and place appointed by the summons, the plaintiff did appear by his counsel and attorney; and his counsel earnestly pressed that he might be heard to shew cause, on the ground that the conviction was illegal and void; but the alderman refused to hear him, because the party was not personally present. We think that, in so refusing, the alderman was wrong in point of law. The legitimate object of the summons did not render necessary the personal appearance of the party: and that object might be better answered if he appeared by his counsel and attorney. In criminal cases, after a verdict of Guilty, this Court requires the personal appearance of the party: but, generally speaking, the Judges are contented to hear any question of fact or law discussed by counsel without the personal appearance of the client.

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It is unnecessary to consider the general law respecting the occasions when a party in the course of legal proceedings is privileged to appear by attorney or counsel, as the Legislature has plainly intimated that, upon such an occasion as that which we are considering, an appearance by counsel or attorney is sufficient. The statute 11 & 12 *Vict. c. 43.*, which is in *pari materia* with *c. 44.*, not only, by sect. 12, allows on the hearing of informations and complaints that the parties may plead by counsel and attorney, but, by sect. 13, which specifies what is to be done if at the return of the summons when the complaint is to be heard the complainant or the defendant do not appear, goes on to say: "But if both parties appear, either personally *or by their respective counsel or attorneys*, before the justice or justices who are to hear and determine such complaint or information, then the said justice or justices shall proceed to hear and determine the same."

Upon the whole, it seems to us that the defence set up has entirely failed; and that the verdict which the plaintiff obtained ought not to be disturbed.

Rule discharged.

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HAUGHTON.

INDICTMENT against the inhabitants of the township of *Haughton*, in the parish of *Manchester*, for not repairing a highway. The indictment contained four counts. The first, second and third described the highway as being in the township of *Denton*, and alleged in each count, on a different ground, that *Haughton* was liable to repair it. The fourth count, on which alone the question discussed in banc arose, described the highway as in the township of *Haughton*, and averred that the inhabitants of the township were, by prescription, liable to repair all roads within the township which would otherwise be repairable by the parish. Plea: Not Guilty. Issue thereon.

At the trial, before *Wightman J.* at the *Liverpool* Summer Assizes 1852, it appeared that the road was out of repair, and that the township of *Haughton* was liable to repair all roads within it. The prosecutors failed in proving the first three counts, but relied on the fourth: and the question became, Whether the road in

Indictment for non-repair of a highway, against the inhabitants of the township of *H.*, averring them to be liable by prescription to repair such highways in the township as the inhabitants of the parish, but for the prescription, would have been liable to repair, with averment that the highway was in the township.

Plea: Not guilty. The prosecutors gave in evidence a record of a presentment by a justice, under stat. 13 G. 3. c. 78., on his own view, that the road in question was

out of repair; averring that it was in the township of *H.*, and that the inhabitants of that township ought to repair it: the record shewed a plea of Guilty by two inhabitants of the township of *H.*, a conviction before the Sessions, and a sentence of fine. Held that this conviction was conclusive evidence, against *H.*, that the road was in that township. And that, though the presentment might be bad on error for not shewing how the township was liable, the conviction, being before a competent tribunal and being unreversed, was not the less an estoppel. Held, also, that it was not necessary to shew that the fine had been levied, the conviction not being impeached on the ground of fraud or collusion.

By a local and personal act (since repealed) it was recited that the highway in question was in the township of *D.* Held, that the recital in the Act was not conclusive, and consequently did not open the estoppel.

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question was within this township, or was in the township of *Denton*. The prosecutors gave in evidence the following record.

"At the General Quarter Session of the peace held by adjournment at *Salford* in and for the County palatine of *Lancaster*," 21st July, 31 G. 3.

"Whereas, at the General Quarter Session of the peace held by adjournment at *Manchester* in and for the said County," 12th October, 26 G. 3., "the king's highway in the township of *Haughton*, in the said County, was presented at the said Session in the words following, that is to say: *Lancashire* to wit. At the General Quarter Sessions of the peace of our Lord the King held by adjournment at *Manchester* in and for the said County of *Lancaster*," 12th October, 26 G. 3., "and so forth, before T. B., D. B. R. and T. B., Esquires, and others their companions, justices" &c., "*Charles Prescott*, clerk, one of the justices of our said Lord the King, assigned for the purposes aforesaid, by virtue of an Act" 13 G. 3. c. 78., "upon his own view, doth present that, from the time whereof the memory of man is not to the contrary, there was and yet is a certain common and ancient king's highway, leading from" &c. "and unto" &c., "used for all the king's subjects, with their horses, coaches, carts and carriages, to go, return and pass, at their will; and that a certain part of the same king's common highway, situate, lying and being within the township of *Haughton* in the said County of *Lancaster*, containing in length" &c., "beginning at" &c., "and ending at" &c., "in *Haughton* aforesaid, and another part of the same highway, within the township of *Haughton* aforesaid, and beginning at" &c., "in *Haughton* aforesaid, and ending at" &c., "adjoining to the township of *Haughton*, and containing in length"

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&c., "on" &c., "and continually afterwards until the present day, was and yet is" out of repair, "to the great damage and common nuisance of all the king's subjects, through the same highway going, returning or passing, and against the peace of our said Lord the King: and that the inhabitants of the township of *Haughton* aforesaid the said common highway, so in decay, ought to repair, when and so often as it shall be necessary. In testimony whereof the said *Charles Prescott* to these presents hath set his hand and seal, this 14th day of *October* in the year aforesaid. *C. Prescott*. And thereupon, at the same Session, a process issued to apprehend two inhabitants of the township of *Haughton* aforesaid, to answer the said presentment. At the General Quarter Session of the peace, held by adjournment at *Manchester* aforesaid, in and for the said county," 18th *January* 27 *G. 3.*, "came *J. H.* and *T. S.*, two inhabitants of the said township of *Haughton*, and, on behalf of themselves and the rest of the inhabitants of the said township of *Haughton*, submitted to the said presentment. And whereas a fine of 60*L.* is by this Court imposed and laid upon the said inhabitants for not repairing and amending the same highway, and the same fine is now ordered to be estreated and levied: This Court doth therefore order and direct that the said fine of 60*L.* shall be levied upon the said inhabitants by, and be paid unto, the hands of *G. H. C.*, of" &c., "Esquire; which said fine, when so as aforesaid levied and paid, shall be by the said *G. H. C.* applied towards the repair and amendment of the same highway."

It was admitted that the road indicted was a portion

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of one of the roads described in the presentment. The prosecutors contended that this record estopped the defendants from denying that the road was within their township, and that no evidence could be given on their part to contradict it. The defendants denied that it was conclusive upon them: they also relied on stat. 59 G. 3. c. xxii., local and personal, public (a), which recited, amongst other things, that the roads within the parish of *Manchester* were repaired by the inhabitants of the townships within which such highways are situated, except (amongst others) "certain portions of two highways, in *Denton*, repaired by the inhabitants of the township of *Haughton*:" and which, by sect. 8, enacted "that the inhabitants of the said township of *Haughton*, notwithstanding anything herein contained, shall be, remain, and continue liable to the repairs of the said portion of the said two highways in *Denton*, in as full and ample a manner as they were, or could or might be, subject or liable to the reparation thereof, in case this Act had not passed; but the said inhabitants of *Haughton* shall not be precluded or debarred by reason of anything herein contained from disputing such liability, in as full and ample a manner as they could or might have disputed the same if this Act had not passed." The highway indicted was a portion of one of those mentioned in the Act: and the defendants contended that the statute was conclusive that the highway was locally situate in *Denton*, and that the inhabitants of *Haughton* could not be liable to repair it without some

(a) "For providing that the several highways within the parish of *Manchester*, in the county palatine of *Lancaster*, shall be repaired by the inhabitants of the respective townships within which the same are situate."

special ground. This Act was repealed by stat. 14 & 15 Vict. c. x., local and personal, public(a). Parol evidence was given, which left no doubt that, in fact, the road was in *Denton*: and the jury so found. The learned Judge directed a verdict for the defendants, reserving leave to move to enter a verdict for the Crown on the fourth count, if the Court should be of opinion that the above mentioned record was, under the circumstances, conclusive.

Atherton, in the ensuing term, obtained a rule *Nisi* accordingly. In this term,

Cowling and *Holland* shewed cause (b). As the plea is Not guilty, to which the prosecutors could not reply so as to place the supposed estoppel on the record, it must be admitted that no question, as to the necessity of taking advantage of an estoppel by pleading and relying on it, can arise in this case. But the judgment on this presentment cannot be an estoppel in any way. In the first place, the presentment is bad on the face of it, as it does not shew any reason why the inhabitants of the township should be liable to repair the highway; and highways, of common right, are repairable by the inhabitants of the parish at large. [*Wightman* J. The presentment may be bad, and the judgment on it erroneous: but can any advantage be taken of that whilst the judgment is unreversed? *Horsy v. Daniel* (c).] It is laid down in *Com. Dig. Appeal* (G 9.) that *auterfois*

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(a) "For relief to the several townships in the parish of *Manchester* from the repair of highways not situate within such townships respectively."

(b) *January* 19th. Before Lord Campbell C. J., *Wightman* and *Crompton* Js. *Coleridge* J., who heard part of the argument, left the Court before it was concluded.

(c) 2 *Lev.* 161.

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J. *Auterfois acquit* and *auterfois convict* are pleas which depend upon the principle that a man shall not be twice in jeopardy for the same thing; not on an estoppel.] It would seem, on principle, that a judgment which may at any time be reversed should not be an estoppel, at least in a criminal case; at all events, not unless it has been acted on. In the present case, it does not appear that the fine has been levied; possibly, if any attempt had been made to levy it, error would have been brought. And it seems hard, if, now, on the first occasion on which an attempt is made to use this against the inhabitants at large, they may not question it. [Lord *Campbell* C. J. I do not think that, in pleading a judgment as an estoppel, it is necessary to aver in the plea that the sentence has been enforced. If there were any case set up, analogous to a special replication, that the plea of the two inhabitants was by fraud against the inhabitants at large, the fact that the fine had not been levied would no doubt be a material piece of evidence. But no such case was raised at the trial.] The Act of Parliament shews that the road in question was in *Denton*. [Lord *Campbell* C. J. At most, the effect of the recitals in that act is to furnish evidence that the roads were in *Denton*. Estoppel against estoppel sets the matter at large; but no evidence, however strong, is enough to do so unless it would be itself conclusive.] On general principle, a judgment against a township or parish, on a presentment or indictment, for not repairing a road is not an estoppel between the Crown and the inhabitants of the same township or parish on a new indictment. In general, the record of a conviction or acquittal of a person before a competent tribunal is conclusive as to

the fact of conviction or acquittal, and as to all the legal consequences that follow from such conviction or acquittal: but not otherwise. Thus, it is conclusive to prove that a certain punishment has been incurred, or that the party is exempt from all punishment; that he has become a felon, or that his status is otherwise affected; and for these purposes it is conclusive as against all persons and in all proceedings. That appears to be the doctrine laid down in *The Duchess of Kingston's Case* (a). There is no case where, on an indictment, a prior conviction has been held conclusive, or has been pleaded as conclusive, except as to the legal effect of that judgment. This doctrine is founded on the principle that, when the guilt or innocence of a party is at stake, the public justice of the country is interested in the question, and the tribunal must not determine without being satisfied on the guilt or innocence; it must not take it on trust from the finding of a prior tribunal. In this respect there is a wide difference between a criminal and a civil trial. In the latter, which is of a private nature, the jury may be justified in treating a prior judgment as conclusive, just as they might treat any other proceeding of the parties as conclusive between them. On an indictment of an accessory, the record of the conviction of the principal establishes conclusively that the principal has been convicted; but the accessory is at liberty to prove his own innocence by proving that of the principal; and the jury are bound to act on their own belief, and acquit on that ground, if they believe it; though it is directly contrary to the verdict of another jury. An action lies on the judgment of a foreign Court: the

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modern doctrine is that the grounds of judgments are not examinable, if the Court had jurisdiction; but, if this doctrine were extended to criminal cases, our Courts would be obliged to consider persons guilty merely because they have been found guilty by foreign tribunals acting on principles which are abhorrent to our ideas of justice. Again, in civil proceedings, estoppels are mutual, whether for plaintiff or defendant: but how can an estoppel be said to be mutual in criminal cases, when an acquittal would be no estoppel for the defendant in future? And now, if there should be an indictment preferred against *Denton*, averring the highway to be in that township, and they plead Not guilty, they will have no defence from the proceedings on this indictment. The verdict must go against them; and the Crown will have two townships respectively estopped from denying that the same road is in each, and yet the Crown not estopped as to either. There is no authority to shew that the Crown is ever estopped in criminal proceedings: in *Rex v. St. Pancras* (a) Lord *Kenyon* says that it is not estopped. If then the Crown is not estopped from contending that the road is in *Denton*, in an indictment against *Denton*, why should not *Haughton* have the same right? All estoppels are mutual; *Com. Dig. Estoppel* (B). There are no decisions which would compel the Court to hold the prior adjudication conclusive, a result which would not be creditable to the law. *Rex v. St. Pancras* (a) is supposed to be such an authority. In that case, the indictment was, against the parish of *St. Pancras*, for not repairing a highway laid to be entirely in that parish. In fact the highway

(a) 1 *Peake's N. P. C.* 220.

formed the boundary between St. *Pancras* and the adjoining parish of *Islington*; and the case for the prosecution was that one half of the way was in each parish. Lord *Kenyon* seems in reality to have decided the case, in great measure, on the ground that there was a variance. But a record of a conviction on an indictment, not against the defendants, but against the inhabitants of the parish of *Islington*, was produced; and he is reported to have then said: "But this record is conclusive evidence against the parish of *Islington*; for, by it, it is found that they are liable to repair the whole of the road called *Maiden Lane*. I admit that had there been an acquittal, the record could not have been evidence for the parish of *Islington*. The reason why it would not have been evidence for them, is because some other parties might have indicted them, and those parties could not be bound by this record." The reason assigned by him for an acquittal not being evidence would equally prove that a conviction ought not to be so. Indeed the decision seems unintelligible, except on the supposition that the prosecution was at the instance of the parish of *Islington*, (which is probable), and that Lord *Kenyon* thought that they were to be considered the real parties, and that, on a prosecution at their instance, a conviction was conclusive against them, and an acquittal not evidence at all. If so, his opinion has been departed from on both points. In *Regina v. Denton* (a) *Cresswell J.*

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(a) Tried at *Liverpool Spring Assizes* 1852, before *Cresswell J.* It was an indictment against the inhabitants of *Denton* for not repairing the same highway which was the subject of the indictment in the text. The verdict passed for the Crown. A rule nisi for a new trial, or to arrest the judgment, was obtained, and argued in *Trinity* term 1852 (9 June); when the Court made the rule absolute to arrest the judgment, without expressing any opinion on the motion for a new trial. The point stated in the text was not mentioned in the argument in Banc.

1853. received the record of this presentment as evidence of reputation, but not conclusive; and the verdict passed for the Crown. This was also the opinion of Lord *Denman* in *Rex v. Whitney* (a): and in *Rex v. Eardisland* (b), where the records were of convictions of the parish, and were offered as conclusive evidence to disprove a special plea of a custom that the townships should repair, *Le Blanc J.* said: "The records *prima facie* disprove the custom alleged; but I will admit evidence that the pleas of Not guilty were pleaded only by the inhabitants of the townships." That ruling directly contradicts Lord *Kenyon's* dictum that the record of a conviction is conclusive. The fact of the inhabitants of the township alone pleading could make no difference: it was no fraud as between the prosecutor and the defendants. The records of acquittals, which Lord *Kenyon* says are not evidence at all, are on the same footing as records of convictions; that is, they are evidence, but not conclusive; *Rex v. Wandsworth* (c), *Rex v. Middlesex* (d). This seems reasonable; for the road may have been admitted to be out of repair and within the district, and the acquittal have proceeded solely on the ground of non-liability. In *Regina v. Blakemore* (e) the only question was whether there was evidence to support the conviction; and no doubt there was. Several of the Judges, collaterally, considered the pleading point, whether, supposing the record to be an estoppel if pleaded, it was an estoppel on the plea of Not guilty (that point, if it be one, is abandoned by the present defendants): and some of the Judges in *Regina v. Blakemore* (e) considered that the record was an estoppel:

(a) 3 A. & E. 69.

(b) 2 Camp. 494.

(c) 1 B. & Ald. 63.

(d) 1 B. & Ald. 64, not. (d).

(e) 21 L. J. N. S. M. C. 60; S. C. 2 Den. & P. C. C. 410.

but this point was not fully argued, being unnecessary for the decision. [Lord Campbell C. J. It was assumed to be an estoppel; but, no doubt, it was no part of the decision in that case; and it is open to you to contend that the assumption was a mistake.] Records were held not conclusive in *Sintzenick v. Lucas* (a), and *Strutt v. Bovingdon* (b). It will be singular indeed if the Crown may indict *Haughton* or *Denton* at its pleasure, laying the road first in the one and then in the other. It can be in one only; and, which that is, can in reason be determined only by the actual fact.

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Atherton, Monk and *J. A. Russell*, in support of the rule. *Rex v. St. Pancras* (c) has always been considered as settling the law. In note (10) to *Rex v. Stoughton* (d) it is so laid down. And, if *Regina v. Blukemore* (e) is not a decision on the point, at all events the dictum of Lord Campbell C. J., *Parke B.*, *Alderson B.*, *Patteson J.*, and *Cole-ridge J.*, and (according to one report of the case, though not the other) of *Pollock C. B.* also, shew that the opinion entertained by the profession, at the time when Serjeant *Williams* wrote that note, continues to be so down to the present time. There does not seem to be any reason adduced for objecting to this estoppel which would not be equally a reason for objecting to all estoppels. As to the cases cited. In *Rex v. Whitney* (g) the verdict was in conformity with the record given in evidence, so that the question, whether or not it was conclusive, did not arise. *Rex v. Eardisland* (h) was a decision that the estoppel might be set at large by proof of fraud. In

(a) 1 *Esp. N. P. C.* 43.

(b) 5 *Esp. N. P. C.* 56.

(c) 1 *Peake, N. P. C.* 220.

(d) 2 *Wms. Saund.* 160. (6th ed.)

(e) 21 *L. J. N. S. M. C.* 60; 2 *Den. & P. C. C.* 410.

(g) 3 *A. & E.* 69.

(h) 2 *Camp.* 494.

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Sintzenich v. Lucas (a) and in *Strutt v. Bovingdon* (b) the decisions were, that the estoppel was only as to the state of things at the time, and did not prevent the parties from shewing that they had been altered.

Cur. adv. vult.

LORD CAMPBELL C. J., on a subsequent day in this term (*January 29th*), delivered the judgment of the Court.

In this case, we have first to consider the general question: Whether, upon the trial of an indictment against the inhabitants of a parish for not repairing a highway, with a plea of Not Guilty, a prior judgment upon a presentment, against the same defendants, for not repairing the same highway, to which they had pleaded Guilty, is conclusive evidence to prove that the highway is situate within the parish, and that the inhabitants are liable to repair it? Mr. *Cowling*, very properly, admitted that, as the prosecutor had no opportunity of putting the former judgment upon the record, it will not the less operate as an estoppel because not pleaded as such, if it would operate as an estoppel being pleaded; a doctrine clearly established by the authorities cited in *Regina v. Blakemore* (c). In *Rex v. St. Pancras* (d) it was laid down by Lord *Kenyon* that, under circumstances substantially the same as those above propounded, the prior judgment is conclusive evidence. This doctrine has been stated as clear law by every text writer who has since written upon the subject, and has been several times recognized by judges, but has never been the foundation of any solemn decision; and Mr. *Cowling* was at full liberty

(a) 1 *Esp. N. P. C.* 43.

(b) 5 *Esp. N. P. C.* 56.

(c) 21 *L. J. N. S. M. C.* 60; *S. C.* 2 *Den. & P. C.* 419.

(d) 1 *Peake, N. P. C.* 220.

to controvert it. He begins, very properly, by pointing out that the former judgment could not have operated as an estoppel in *Rex v. St. Pancras* (a), as the former judgment, there, was upon an indictment against the parish of *Islington*. But Lord *Kenyon* said it would have been conclusive evidence against the parish of *Islington* upon another indictment against that parish for not repairing the same part of the same road, and would have precluded the defendants from contending that the part of the road mentioned in the indictment was not in their parish. We do not find that this doctrine is contradicted by any of the authorities cited by Mr. *Cowling*. In the *Duchess of Kingston's Case* (b) the judgment in the Ecclesiastical Court was held not to be conclusive to disprove the first marriage, because it was only in a suit for jactitation of marriage, and therefore not final, and because it had been fraudulently obtained. In *Rex v. Whitney* (c) this question did not arise; and it can hardly be considered as affected by the allusion to it in the judgment of Lord *Denman* respecting the structure of the bridge. *Rex v. Eardisland* (d) only shews that the judgment upon the former indictment against the parish may be impeached on the ground of fraud. If the defence to the indictment against the parish had been collusively conducted by the inhabitants of a particular township by whom the road ought to have been repaired, the liability of the whole parish to repair the road ought not to be established by such a judgment. The case of *Regina v. Denton* (e), before my brother *Cresswell*, is entitled to no

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(a) 1 *Peake*, N. P. C. 220.

(b) 2 *Smith's L. C.* 424; *S. C.* 20 *How. St. Tr.* 355.

(c) 3 *A. & E.* 69, 71, (d) 2 *Camp.* 494.

(e) *Ante*, p. 509. not. (a).

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weight; for, although evidence is said to have been adduced to rebut the effect of a former judgment, the point of estoppel was not there made. On principle, Mr. *Cowling* objects to this judgment, following a conviction, being conclusive against the parish although the judgment could not have been evidence for the parish, had there been an acquittal. This, however, does not proceed on the want of mutuality, which ought to exist with respect to estoppels, but only because a verdict of Not guilty might have proceeded on the ground that the road was not out of repair; whereas there could not have been a verdict of Guilty without proof and finding that the defendants were bound to repair the road, as well as that it was out of repair. The liability to repair being in issue, and being found by verdict followed by a judgment, upon a subsequent indictment against the same parish for not repairing the same highway, the same question of liability again coming in issue,—according to the general doctrine of estoppel, after the former judgment has been given in evidence (no fraud being imputed),—the defendants ought not to be allowed to be permitted to give any evidence for the purpose of disproving their liability. Mr. *Cowling* has called upon us to respect the consciences of jurymen, who may thus be required to find a verdict contrary to what they know to be the fact: but the oath taken by a jurymen is to find a true verdict *according to the evidence*: now the former judgment is allowed to be evidence; and, according to the doctrine of estoppel, no other evidence can be laid before them: so that the finding according to the judgment is a true verdict in exact conformity to the oath they have taken. In *Regina v. Blakemore* (a),

(a) 21 L. J. N. S. M. C. 60; S. C. 2 Den. & P. C. C. 410.

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although this doctrine was not the *ratio decidendi*, at least four of the judges expressed their entire assent to it; and the only doubt that existed was, whether the former judgment could operate as an estoppel without being put upon the record. With respect to the general doctrine, therefore, we are all against Mr. *Cowling*.

But, then, he objects that in this case there shall be no estoppel, because the presentment was bad on the face of it, in not stating how the inhabitants of *Haughton* were bound to repair the highway. We think however that, although the presentment might have been held bad for this defect on demurrer, or in arrest of judgment, or on a writ of error, the defendants, having acquiesced in the judgment, cannot now make this objection to it. The presentment aptly describes the road, and states it to be in the township of *Haughton*, and avers that the inhabitants of the township were bound to repair it; and these are the facts which are now again to be established. Mr. *Cowling* next objects that there was no evidence of the fine imposed by the judgment being paid, as there was in *Regina v. Blakemore* (a). Execution of the judgment cannot be necessary to give effect to it as an estoppel, if it was duly pronounced. The non-payment of the fine might have been some evidence of collusion; but, where no fraud is imputed, it is wholly immaterial.

Lastly, Mr. *Cowling* relies upon the two Acts of Parliament, in which this road is described as being in the township of *Denton*. But this is a mere recital in the first Act of Parliament, which is repealed by the second. At most, therefore, it may be considered evidence that the road is in *Denton*; but, against the

(a) 21 L. J. N. S. M. C. 60; S. C. 2 Den. & P. C. C. 410.

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 v. should be considered in *Denton*, this would have pre-
 Inhabitants of HAUGHTON. vailed over the estoppel: but a mere recital in an Act
 of Parliament, either of fact or law, is not conclusive;
 and we are at liberty to consider the fact or the law
 to be different from the statement in the recital.

These objections being overruled, it follows that the
 judgment upon the presentment was conclusive evidence
 against the defendants, and that the rule must be absolute
 to enter a verdict for the Crown.

Rule absolute.

Tuesday,
 January 25th.

COE against LAWRENCE.

A clerk to the
 justices of a
 borough, who
 is employed in
 the prosecution
 of a person
 committed by
 such justices, is
 not liable to the
 penalty of 100*l.*
 under stat.
 5 & 6 W. 4.
 c. 76. s. 102.

DEBT, by plaintiff, suing as well for the Treasurer of
 the Borough of *Ipswich* as for himself. The first
 count of the declaration stated that defendant, after the
 passing of an Act &c. (Municipal Corporations Act,
 5 & 6 W. 4. c. 76.), to wit on 20th *March* 1852, then,
 and at the time of the commitment hereafter next men-
 tioned, being clerk to the justices of the peace of and
 for the Borough of *Ipswich*, to which borough a separate
 commission of the peace had been theretofore granted
 under the provisions of the said Act, and which was
 then in force, was employed, as attorney, and for reward
 to the defendant in that behalf, in the prosecution, at a
 Court of Gaol Delivery holden on the day and year
 aforesaid in the county of *Suffolk*, of one *William Cage*,
 an offender who had been theretofore, to wit on 15th

*March 1852, committed by Thomas D'Eye Burroughs, Charles Burton and Thomas Baldock Ross, Esquires, then being and acting as justices of the peace of and for the said Borough, to take his trial for the offence for which he was so prosecuted as aforesaid, contrary to the form of the statute &c. Whereby, and by force of the statute &c., defendant forfeited, for his said offence, the sum of 100*l*.: and thereby, and by force of the statute &c., an action hath accrued to the plaintiff, who sues as aforesaid, to demand and have the said sum of 100*l*. of and from defendant.*

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Demurrer (*a*). Joinder.

Cowling, for the defendant. The declaration shews no offence within the penal part of sect. 102 of stat. 5 & 6 *W. 4. c. 76*. That section, after empowering the justices of a borough to appoint a clerk to the justices, and remove him at pleasure, contains two provisoes. The first is: "that it shall not be lawful for the said justices to appoint or continue as such clerk to the justices any alderman or councillor of such borough, or clerk of the peace of such borough, or the partner of such clerk of the peace, or any clerk or person in the employ of such clerk of the peace." The second is: "That it shall not be lawful for the said clerk to the justices, by himself or his partner, to be directly or indirectly interested or employed in the prosecution of any offender committed for trial by the justices of whom he shall be such clerk as aforesaid, or any of them, at any Court of Gaol delivery or general or quarter sessions." The defendant appears, by the declaration, to have violated the second

(*a*) There were other counts; and all were demurred to: but it was agreed that the point in dispute was sufficiently raised by the first count.

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proviso; and he has therefore acted unlawfully. But in this action of debt the question is whether he is within the penalty clause which follows: "And any person being an alderman or councillor, or clerk of the peace of any borough, or the partner or clerk or in the employ of such clerk of the peace, who shall act as clerk to the justices of such borough, or shall otherwise offend in the premises, shall for every such offence forfeit and pay the sum of 100*l*., one moiety thereof to the treasurer of such borough," "and the other moiety thereof, with full costs of suit, to any person who will sue for the same in any of his Majesty's Courts of record at Westminster." The defendant is not an alderman, or councillor, or clerk of the peace, or partner or clerk of, or person employed by, such clerk of the peace: and only persons in these characters are within the clause. This may possibly be an accidental omission on the part of the Legislature: but there seems ground for contending that the penal clause was intentionally directed only against offences falling within the first proviso. The enactment in the second proviso might be sufficiently enforced by means of the power of dismissal; but, as the first proviso might be transgressed by the justices of the borough, it might be thought necessary to give third persons a power of punishing such transgression. At any rate, the clause, being penal, must be construed strictly.

G. Hayes, contra. The penalty clause is not very accurately framed: but it seems that the word "who" should be transferred, so as to stand before the words "being an alderman" &c.: the penalty will then apply in two cases, the second being within the words "shall

otherwise offend in the premises." This will therefore make it applicable to each proviso. If not, these last words are useless: for cases under the first proviso are met by the words which precede. The enactment of the penalty mitigates the second proviso: it prevents the party transgressing from being prosecuted as a criminal, by specifying another remedy for breach of the law. If the intention had been to confine the penalty clause to cases under the first proviso, the clause would have been placed between the two provisos.

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Cowling, in reply. It is not to be assumed that the infliction of a penalty of 100*l.* is a lighter punishment than that which would ensue upon an indictment. The attempt is to enlarge a penal clause by introducing additional words.

LORD CAMPBELL C. J. I really cannot doubt what the Legislature intended to do: but they have not carried it into effect. We must see that there are words to meet the supposed offence, before we apply the penalty clause. The defendant is not alderman, councillor, clerk of the peace, or clerk to, or employed by, such clerk: and he cannot therefore be within the clause. It was suggested that the word "who" should be inserted between "any person" and "being an alderman." But that would not be enough: for then the words "being an alderman" would be carried through the whole enactment. It might perhaps be done by inserting "or any person who" before the words "shall otherwise offend:" that might meet the case, inasmuch as the defendant has certainly done that which is prohibited by the second proviso. But the penalty clause now applies only to those who are in the offices there specified, among which the

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clerk to the justices is not included. The nominative to the words "shall otherwise offend" does not comprise that office. We are not justified in inserting words for the purpose of extending a penalty clause to cases not expressly comprehended in it. I regret that, in consequence of the careless and very inaccurate manner in which the clause is drawn, the intention of the Legislature cannot be carried into effect: but it is better that we should adhere to the words they have used, than that we should strive to amend it. By putting the correct grammatical construction on the words which we find, we may perhaps induce greater care on the part of those who frame the laws.

COLERIDGE J. I am of the same opinion. There is no doubt that the section is incorrectly drawn. There are two distinct prohibitory provisoes: and it is quite obvious that the intention was to annex the penalty to the violation of each. But this cannot be done if a grammatical construction be given to the words used. The only way in which it can be done is by inserting, as my Lord points out, the words "any person who" before "shall otherwise offend." But I never heard that it was allowable to insert words for the purpose of extending a penal clause: and this clause, though it may relieve from indictment, is in itself a penal clause. And, even if that were not so, it is quite wrong to alter the language of a statute for the purpose of getting at its meaning.

WIGHTMAN J. If I could support this declaration consistently with the grammatical meaning of the words, I should be inclined to do so; for I cannot doubt that this case is within the mischief pointed at. But the

words, as they stand, are too clear. We cannot get rid of the grammatical construction: and we cannot adopt the suggestion of dislocating some words and introducing others.

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CROMPTON J. We might, as has been pointed out, bring the clause to meet the case by inserting words before "shall otherwise offend." But it will not do to insert words for the purpose of construing a penal clause: and I am of the same opinion with the rest of the Court.

Judgment for defendant.

The following case is inserted here, on account of its connection with the case which follows.

GEORGE GREENWOOD TETLEY and HENRY WILLIAM RIPLEY *against* WILLIAM TAYLOR.

DEBT, for goods sold and delivered, and on an account stated. Plea: as to 43*l.* 11*s.* 10*d.*, parcel &c.: That, before and at the time of making the indenture after mentioned, defendant was a trader liable to become bankrupt under the bankrupt laws; and that, before and at the time of making the indenture, he was a trader, and by six sevenths of his creditors to the amount of 10*l.*: not including plaintiffs; by which defendant and his sureties covenanted to pay 7*s.* 6*d.* in the pound to each creditor, to be secured by notes of himself and sureties, and the creditors in consideration thereof released defendant. Held, by the Queen's Bench, that this deed was binding on the plaintiffs, under sect. 224, though it did not provide for the distribution of the whole of the trader's estate. Held, by the Court of Exchequer Chamber, reversing this judgment, that sect. 224 does not make any deed of arrangement binding on a creditor, who has not executed it, unless such deed provides for the distribution of the whole of the trader's estate, as in bankruptcy.

Debt for goods sold. Plea: a composition deed, executed, after the taking effect of The Bankrupt Consolidation Act, 1849 (12 & 13 Vict. c. 106.), by two sureties, by defendant,

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indebted to the parties of the third part to the indenture, and to divers other persons, in divers sums, and was unable to pay the same in full; and defendant, before the time of making the indenture, after the passing and coming into operation of stat. 12 & 13 *Vict. c. 106.*, suspended payment; and thereupon, "by a certain indenture, made after the passing and coming into operation of The Bankrupt Law Consolidation Act, 1849" (12 & 13 *Vict. c. 106.*), "and after the 11th day of *October* A. D. 1849, to wit on" &c.: profert: averments of the legal effect of parts of the indenture, afterwards set out on oyer. Averments: That the indenture is "an arrangement by deed, and a deed of arrangement, within the meaning of the provisions of the said Act, with respect to arrangements by deed; and that the creditors, by whom and on behalf of whom the said deed was so signed and executed as aforesaid, were more than six sevenths, in number and value, of the creditors of the defendant, within the meaning of the said provisions of the said Act, whose debts amounted, within the meaning of the said provisions, to the sum of 10*l.* and upwards, accounting every creditor as a creditor in value, in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property, and other such available securities or liens from the defendant, appeared to be the balance due to him; and that the said creditors, by whom and on behalf of whom the said deed was so signed as aforesaid, thereby assented to the said deed and to be bound thereby." That plaintiffs were, at the time of making the deed, creditors of defendant in respect of the 43*l.* 11*s.* 10*d.* to which the plea was pleaded, within the meaning of the provisions of the said Act; and that, at

the time of making the deed, that amount was a debt due from defendant to plaintiffs within the meaning of the deed, and that it is not, nor is any part thereof, the amount, or any part of the amount, of the said composition, and did not accrue to the plaintiffs in respect of the said composition or any part thereof. That plaintiffs had notice from defendant of his suspension of payment, and of the deed of arrangement, and were requested by defendant to sign and execute it; and plaintiffs might and could (if they would) have signed and executed the same, as parties thereto of the third part; and that three calendar months from the time when plaintiffs had such notice expired before the commencement of the suit. Averment of general performance by defendant and the parties of the second part. And that, "by reason of the premises, and by force of the statute aforesaid, the said deed (the same having been at all times from the making and entering into the same, and being still, in force) became and was, and is, as obligatory on the plaintiffs as if they had duly signed and executed the same; and that, by reason of the premises, the defendant, before and at the time of the commencement of this suit, became and was released and discharged from the said causes of action in the introductory part of this plea mentioned:" verification.

The indenture was set out on oyer, as follows.

"This indenture made" 14th *September* 1850, "between *William Taylor*, of" &c., "of the first part; and" *J. V., G. J. and T. P.*, of &c., "of the second part; and the several persons whose names and seals are hereunto subscribed and set (being respectively creditors of the said *W. T.* or the authorized agents of such creditors), of the third part. Whereas the said *W. T.* is

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justly and truly indebted unto his said several creditors (parties hereto of the third part) in the several sums of money set opposite to their respective names as hereunder written, and, being unable to pay the same in full, he has proposed to pay unto each and every of them a composition after the rate of 7*s.* 6*d.* in the pound upon and in full satisfaction for their respective debts, by three equal instalments of 2*s.* 6*d.* in the pound each at four, eight and twelve calendar months after the date hereof, and to be secured by the covenant hereinafter contained in that behalf, and also by the joint and several promissory notes of the said parties hereto of the first and second parts, or by bills of exchange, in lieu thereof, bearing their signatures, and payable or indorsed to the said creditors respectively; to which arrangement and proposal the said creditors (parties hereto) have consented and agreed: and it has been further arranged and agreed, between the said parties to these presents, that the said creditors (parties hereto of the third part) shall enter into the covenants and agreements hereinafter contained, on their parts to be observed and performed, and that the arrangement and agreement for payment of the said composition of 7*s.* 6*d.* in the pound shall be subject to the proviso hereinafter contained for making the same void in the event of the bankruptcy of the said *W. T.*, or in case six sevenths in number and value of his creditors, whose debts amount respectively to 10*l.* and upwards, shall not execute or assent in writing to these presents on or before the 14th day of *December* next: Now this indenture witnesseth that, in pursuance of the said arrangement and agreement, and in consideration of the composition of 7*s.* 6*d.* in the pound having been so secured to the said creditors by promis-

sory notes or bills of exchange as before mentioned" (acknowledgment of the receipt of such notes &c.), "and in consideration of the covenant hereinafter contained for payment of the said promissory notes" &c. "on the part of the said parties hereto of the second part to be observed and performed: they the said creditors of the said *W. T.* executing these presents, by themselves or legal substitutes," each, for himself and his partners only, severally covenanted with *W. T.* "that they, the said several creditors (parties hereto), shall and will accept the aforesaid composition or sum of 7*s.* 6*d.* in the pound, in full satisfaction and discharge of the several debts and sums of money due and owing to them by the said *W. T.*, as specified in the schedule hereunder written. And also that" &c.: covenant for further assurance, after full payment of the said composition, for the more effectually releasing *W. T.*, his executors, &c., from the said debt. "And also that they, the said creditors of the said *W. T.*, shall not, nor will, sue or prosecute him, his heirs," &c., "either at law or in equity, for the said several debts, or sums of money, so due and owing to them respectively, or any or either of them, or any part thereof, except for the recovery of the amount of the said composition of 7*s.* 6*d.* in the pound, in case the same or any part thereof shall remain unpaid when it or any instalment thereof becomes due;" and that, in case of such suit &c., "it shall be lawful for him and them to plead these presents in bar of any such action or suit. And also" &c.: several covenant by the creditors respectively to keep harmless and indemnify "the said *W. T.*, his heirs, executors and administrators, from and against all bills of exchange and promissory notes which have been paid or delivered by the said *W. T.* to them,

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the said creditors, respectively, whether such bills of exchange or promissory notes have been already returned dishonoured, or are now in circulation, or otherwise, and from all sums of money payable on account thereof, and from all actions" &c. "by reason of the non-payment thereof. And the said *W. T., J. V., G. J.* and *T. P.*, jointly and severally," &c., "covenant" &c., "with and to each of the said creditors of the said *W. T.* (parties hereto of the third part), that" *W. T., J. V., G. J.* and *T. P.*, their executors, &c., "or some or one of them" &c., shall pay the said promissory notes or bills of exchange for the said composition or sum of 7s. 6d. in the pound, as and when the same shall respectively become due and payable." Proviso: "That, if, at any time previous to the payment of the said composition of 7s. 6d. in the pound, any petition for adjudication of bankruptcy, or fiat, or commission in bankruptcy, shall be filed, awarded or issued against the said *W. T.*, under which he shall be declared or found a bankrupt, then it shall be lawful for the said creditors (parties hereto)" &c., "to prove the full amount of their several debts, now due and owing as aforesaid, or so much thereof as shall then remain unpaid, under such petition, fiat or commission." Proviso: "That, in case these presents shall not be executed or assented to in writing, on or before the 14th day of *December* next, by six sevenths in number and value of the creditors of the said *W. T.*, whose debts respectively amount to 10*l.*, either by themselves or some person or persons duly authorized by them respectively in that behalf, then, and in such case, these presents and every clause" &c. "herein contained, as also the said promissory notes or bills of exchange so paid or delivered to the said creditors

for the said composition as before mentioned, shall, at the election of the said parties hereto of the first and second parts, cease, determine and be void, and, in default of such election, remain in full force; and, upon such election making the same void, the said parties hereto of the second part, their heirs, executors and administrators, shall stand and be released and discharged from all liability under the covenant and agreement hereinafter contained for payment of the aforesaid composition" &c., "and all and every of the said creditors, who shall have executed or assented in writing to these presents," &c., "shall be restored to the same state and condition, with respect to their said several debts, and have the like remedies to sue for and recover the same, as they would have had, or been entitled to, in case these presents had never been made, any thing herein contained to the contrary thereof notwithstanding. In witness" &c.

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Demurrer, assigning causes not necessary to be noticed. Joinder.

The demurrer was argued in *Michaelmas* term, 1851 (a), by *Willes* for the plaintiff and *Phipson* for the defendant. The arguments sufficiently appear from the judgment, and from the arguments of the same counsel in error.

Lord CAMPBELL C. J., in the same term (*November* 21st), delivered the judgment of the Court.

The question in this case is, whether a composition deed, signed by six sevenths in number and value of the creditors of a trader, is a bar to an action by a creditor who has not signed it, if, upon payment of the compo-

(a) *November* 14. Before Lord Campbell C. J., *Patterson*, *Coleridge* and *Wightman* Js.

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sition, the trader is to continue in possession of his property, and his creditors are to release him from his debts. Mr. *Willes*, very properly, admits that such a deed does come within the language of stat. 12 & 13 *Vict. c. 106. s. 224.*, and that he is bound to shew that a condition is subsequently mentioned in the statute, which excludes such a deed from its operation. Sect. 224, without expressly naming a composition deed, or any other species of the class of deeds to which it belongs, enacts "that every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six sevenths in number and value of those creditors whose debts amount to 10*l.* and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement as if they had duly signed the same." It is impossible to contend that these words necessarily require that the deed should provide for the distribution of all the trader's effects among his creditors, or that they exclude a deed which allows him to remain in possession of them on payment of such a composition as is satisfactory to six sevenths of his creditors, and on performance of such other stipulations as they consider more for their advantage than forcing him into bankruptcy, or requiring that his trade shall be stopped, that all his property shall be sold, and that they shall accept a dividend from the fund produced by the sale. The

section, cautiously and anxiously, guards against the supposition that the deed, to be protected, must embrace all the matters which it enumerates. We can see no absurdity in supposing that composition deeds are meant to be included in the enactment. We know that they are very common in practice, and are frequently very advantageous, both for the creditors and the debtor. The composition offered may be considerably more than would be the dividend on an immediate sale and distribution of his effects; and he may be enabled to pay this composition, from the assistance of friends, and from being permitted to avail himself of his position in the commercial world, which would be utterly lost if he were made a bankrupt. A great power is certainly given to the six sevenths in number and value of the creditors: but they can only place the remaining seventh in the same situation in which they have placed themselves; and it surely would not be imputing any absurdity to the Legislature, the words employed by them naturally bearing such a meaning, if we suppose that they considered the risk of the six sevenths, in number and value, of the creditors agreeing to accept a composition less than they could obtain by resorting to their legal remedies was so small as not to deserve consideration, or, at least, to outweigh the risk of fair and beneficial deeds of arrangement being defeated by the refusal of one or two creditors to join in the arrangement, or of dissenting creditors obtaining a preference by refusing to concur until, by a clandestine bargain, their claims are fully satisfied. Our books of reports abound with cases which have arisen out of such fraudulent transactions; and an attempt to put an end to them might be considered not unwise or unbecoming.

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It is likewise to be observed, that a composition, with the consent of a certain proportion of the creditors, is clearly sanctioned under sect. 230, after a fiat and the bankrupt has passed his last examination; and it would seem strange if an arrangement by composition could only be effected through the expensive process of a fiat and adjudication of bankruptcy, and all the steps required to be taken down to the last examination of the bankrupt. The consent of a larger proportion of the creditors (nine tenths) is required, if the composition is not offered till this advanced stage, when the estate is probably materially injured; but the same power may, not improbably, be given, by general words, to six sevenths of the creditors, in an earlier stage, when the composition is likely to be larger. We must look however to the enactment, by which it is contended that a condition inconsistent with a composition deed is imposed upon all deeds to be protected by sect. 224. Mr. *Willes* relies entirely upon the words in sect. 228: "That the creditors of every such trader shall have the same rights respectively as to set-off, mutual credit, lien, and priority, *and joint and separate assets shall be distributed, in like manner as in bankruptcy.*" The first part of this enactment, as to the *rights* of creditors, only points out the mode in which the amount of the debts claimed by them is to be ascertained, and applies as well to a *composition deed* as a deed under which all the effects of the trader are to be sold and distributed among his creditors. The remaining words, "and joint and separate assets shall be distributed, in like manner as in bankruptcy," do not apply to a *composition deed*: but are they enough to shew the intention of the Legislature that every deed, to which they do not apply, is

to be excluded from the protection given by the statute to such arrangements? They do not apply, unless the trader has been in partnership, and has joint and separate assets; so that a sole trader and his creditors cannot have the benefit of a deed of arrangement against the will of any rapacious or fraudulent creditor, even if the business of the trader is entirely stopped, and all his effects are to be sold for distribution among all his creditors. But may not the meaning be that, *when there are joint and separate assets to be distributed*, they "shall be distributed, in like manner as in bankruptcy." This is no general enactment that, in every case, the assets of the trader must be distributed according to the bankrupt law; and it seems to say no more than that, where the trader has been in partnership, and has separate as well as joint property to be distributed, the separate creditors are to have the benefit of the separate assets, and the joint creditors of the joint assets, but does not impose a necessity for having any such distribution if the creditors are contented rather to take a certain proportion of their debts guaranteed by sufficient sureties. Sect. 224 clearly comprehending composition deeds, the subsequent proviso, to exclude them, ought to be clear; but the words relied upon are at most equivocal; and sufficient effect may be given to them without supposing that they are meant to narrow the operation of the act to cases where, in mercantile language, the trader is to be "broken up," leaving the frauds and mischiefs, long experienced in arrangements by composition deed, untouched. We have been (not unduly) pressed with the authority of *Drew v. Collins* (a).

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To that authority we have paid the most sincere respect; but, after a very careful examination, we are not able to assent to the reasoning on which it rests. As it is only the decision of a court of coordinate jurisdiction, we do not consider ourselves bound by it: and we have the less reluctance to decide according to our own opinion, as, the question being upon the record, it may be carried to the Exchequer Chamber and the House of Lords.

We therefore feel that on this demurrer we are bound to give judgment for the defendant.

Judgment for the Defendant.

The plaintiff brought error in the Exchequer Chamber. Joinder in error.

The case was argued in *Trinity* vacation (*June* 14), 1852.

Willes, for the plaintiff in error (the plaintiff below). The judgment of the Queen's Bench is inconsistent with the general policy of the statute and the language of the particular clauses. Had it been intended that one seventh of the creditors to amounts of 10*l.*, and all the creditors to amounts of below 10*l.*, should be bound to give up a portion of their claims, by virtue of the resolution of six sevenths of the creditors of the former class, there would undoubtedly have appeared in the statute provisions for a general meeting of all the creditors. On the construction adopted by the Court below, a debtor might obtain the assent of the six sevenths by solicitation, abstaining from any communication with a creditor, among the remaining seventh, who might have most reason to dissent, and who might have just ground of complaint respecting the circumstances under which

the debt was contracted: the creditors under 10*l*. might also have similar grounds for dissenting; or the creditor most interested in resisting the compromise might be abroad. It was assumed by the Court below that it was conceded, on the part of the plaintiff, that sect. 224, unless qualified by the other clauses of the statute, was sufficient to give validity to this deed. No such concession was intended. But the other clauses, both by the general inference which they afford as to the intention of the Legislature, and by their express provisions, do effectually qualify sect. 224, even if, taken alone, it would justify the view taken by the Court below. It is not probable that in a transaction which is to take place without the controul of the Bankruptcy Court the interest of the creditors has been provided for less vigilantly than in cases where the Court superintends the proceedings. The clauses which regulate the arrangements by deed, to be signed by six sevenths of the creditors to an amount of 10*l*., are those from the 224th to the 229th, both included. Sect. 224 makes the deed obligatory upon non-assenting creditors, "subject to the conditions hereinafter mentioned." Now, sect. 229 reserves the power to "any creditor" of impeaching the administration of the estate, as having "not been duly conducted in conformity with such deed or memorandum of arrangement." If this is not a condition to which the deed is subject, by sect. 224, the clause is unmeaning, and the Court of Bankruptcy has no superintendence at all: if it be such a condition, all the intermediate sections may be looked to for such conditions also. Sect. 229 is not noticed in the judgment below: yet, if it be not a controuling condition, a creditor who had not signed the deed of arrangement

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would be without remedy if the debtor chose to withhold payment. Or, if the notes to be given under the deed should not be paid when due, the creditor could merely have a remedy, on the notes, for a portion of the debt, at the time of maturity, in lieu of a right of action for the whole at any earlier time after the accruing of the debt. But, further, in sect. 229 "the administration of the estate of such trader" is spoken of: what meaning can be attached to those words unless the estate, that is the whole estate, is to be administered under the deed of arrangement? Sect. 228 enacts positively that the creditors are to have the same rights, as to set-off, mutual credit, lien and priority, "in like manner as in bankruptcy:" this is a positive enactment, not one which is to depend upon the provisions of the deed of arrangement. It is not easy to see how this is to be applied, if all the claims are to be reduced to so many shillings in the pound. The next enactment in the same section affords a still stronger inference: "joint and separate assets shall be distributed, in like manner as in bankruptcy." It is impossible that the Legislature should have provided that, where there are debtors in partnership, the whole of the assets must be distributable, while, if there was but a sole debtor, his assets need not be distributable. The object of the clause was to put the estates of partner debtors in the same position in which it was assumed that the estate of a single debtor was placed. [*Maule J.* I should rather understand the enactment to be that all assets were to be distributable as in bankruptcy; and that the framer of the clause, lest there should be any doubts respecting the case of partners, added the words in question, with the view of enlarging the provision, not of narrowing it.]

That is a natural construction. [*Maule J.* You say that a composition is not intended at all.] Yes. The intention is to enable six sevenths of the creditors to the amount of 10*l.* to make an arrangement for working a bankruptcy out of Court. [*Parke B.* A *cessio bonorum*?] Yes. The enactment in sect. 228 becomes very material when considered in connection with the rights reserved to a dissatisfied creditor by sect. 229. [*Maule J.* It does seem strange that a creditor, under sect. 229, should have the right to complain of the non-administration of the estates of partners, even of their separate estates, but no right of complaint in respect of the non-administration of the separate estate of a single debtor.] That is nevertheless a consequence to which the judgment of the Court below will lead, according to their own exposition. [*Cresswell J.* Might not the enactment mean this: that, when the deed provides for distribution, the joint and separate assets shall be distributed as in bankruptcy?] It would be strange if the Legislature protected only the case least needing protection. The enactment is absolute. [*Maule J.* There would otherwise be no "conditions," so far as the distribution of assets is concerned, to which the power given by sect. 224 to bind non-assenting creditors would be subject. *Jervis C. J.* How is the distribution to be carried into effect, according to your view?] The estate may be conveyed to trustees; or the creditors, if they please, may intrust the management to the bankrupt. By the proviso at the end of sect. 228 every one who could prove in bankruptcy is a creditor under the arrangement deed. This shews that the arrangement was to be in analogy to the ordinary bankrupt law. And the same intent appears throughout the statute. Sects. 177, 178,

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provide for proofs in the case of contingent debts and liabilities: and this can be done only through the instrumentality of the Court: the Court is to fix the value and amount. If the principle of the judgment below be correct, the six sevenths of the creditors might release the debtor absolutely. [*Jervis C. J.* My brother *Alderson* suggests a case of a debtor owing 1*l.* to each of two thousand creditors, and 1000*l.* to one other: then, if the power be as the defendant suggests, the last named creditor, on condition of his receiving his whole debt, might release the debtor absolutely.] It is important to look at the provisions made for the case of arrangement under the superintendence and controul of the Court, sect. 211 to sect. 223, both included. Under sect. 213 every creditor is to have notice of the private sitting, and may be examined by the Court: by sect. 223 the debtor may be made a bankrupt if any debt be contracted "by reason of any manner of fraud or breach of trust." The power of the Court, under these clauses, is less than that of the six sevenths of the creditors under the deed of arrangement clauses, according to the construction of the Court of Queen's Bench. [*Maule J.* According to the view of the Court below, sect. 224 empowers the six sevenths to do, without the assistance of the Court, that which, by the earlier sections, is to be done with that assistance. *Parke B.* The only difference is as to the number of creditors that are to assent; by sect. 216 three fifths of those who have proved debts to the value of 10*l.* may bind.] Again, the clauses as to compositions after adjudication of bankruptcy, 230, 231, require notice to all the creditors, and the concurrence of nine tenths of those whose debts amount to 20*l.* [*Jervis C. J.* It is observable that

those sections use the word "composition," which thus appears opposed to the word "arrangement" in sect. 224.] The defendant relies upon *Drew v. Collins* (a) as a sounder decision than that of the Queen's Bench in the present case.

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Phipson, contra. The object of the clauses relating to the deed of arrangement was to render bankruptcy unnecessary: and it is therefore a fallacy to interpret these clauses by analogies derived from actual bankruptcy. One object was to prevent reasonable arrangements from being defeated by the obstinacy of a single creditor. The Court will construe the clauses so as to effectuate this object. The words of sect. 224 are sufficiently plain to throw upon the plaintiff the burthen of invalidating the effect of the deed. [*Jervis* C. J. Do you say that a simple release would be sufficient?] That might shew fraud. [*Martin* B. Not necessarily so: the six sevenths of the creditors might think the debtor honest and unfortunate.] If there were no fraud, a simple release would be valid: but the supposition of a mere release is utterly improbable. The statute provides for three cases: first, arrangements between traders and their creditors under the superintendence and controul of the Court, sects. 211—223; secondly, arrangements by deed, sects. 224—229; thirdly, composition after adjudication of bankruptcy, sects. 230, 231. Now, as to the first case: by sect. 214, the debtor may offer a compromise; yet there is nothing afterwards to shew that less than the whole estate is to be distributed. If, therefore, a literal construction were adopted, it would follow that,

(a) 6 *Exch.* 670.

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even with the sanction of the Court, there can be no compromise in the first case, although the debtor is authorized to offer one. This shews that it is impossible to adhere rigidly to the words used. [*Jervis C. J.* You say, therefore, that the word "arrangement," in sect. 224, may comprehend compromise.] That is so: and that gives a reasonable application of the statute; because it may well be a better arrangement to accept ten shillings in the pound, well secured, than to run the risk of a sale of all the effects. Stress is laid on the word "conditions," in sect. 224; but all deeds are subject to conditions. Sect. 226 shews that a full distribution is not considered necessary; for it is difficult to understand how that could be effected without the introduction of trustees, which, nevertheless, the statute dispenses with. [*Parke B.* They may leave the trader to manage his own estate. *Jervis C. J.* They may rely upon him, or take security.] That is certainly not impossible. [*Jervis C. J.* It is highly probable: it is often done.] No difficulty can arise under sect. 228, as to lien: where the lien exists, the deed could not affect it, on any view. As to priority, it can hardly exist under the bankrupt laws. [*Willes.* It would take effect in the case of wages.] The clause as to joint and separate assets is a provision for a particular case, that of partner debtors, in which case alone could these two classes of assets exist. [*Alderson B.* How could you apply the provision as to priority to a composition deed?] It could not be so applied: that, and other provisions, are inserted to meet the case where the deed of arrangement does stipulate for a complete distribution. Where the deed does so stipulate, but excludes priority, it is possibly void. Sect. 215 enacts that, in the case of arrangements under

the controul of the Court, the proof shall be as in bankruptcy: yet in such arrangements the debtor is expressly authorized to offer a composition. Sect. 229 will apply in cases where the deed provides for distribution: and, in fact, all the clauses become intelligible and consistent if they are treated as applicable only to the particular cases where the facts admit of the application. It is objected that no provision appears for giving notice, before the deed of arrangement, to creditors to an amount under 10*l*.; but there is no provision of that sort in respect of any creditors whatever. The protection, as to all the non-assenting creditors, is the three months' clause, sect. 225. What is the protection in the case of arrangements of the first class? [*Maule J.* There must be express notice to all; sect. 213.] The creditors are bound, whether they attend or not. [*Maule J.* If they do not assent after notice, they are understood to assent to being bound by the acts of those who do attend.] It is argued that a creditor may be abroad; but this objection also would exist in the case of a composition under the first class. [*Alderson B.* But there the sanction of the Court is necessary.] The general argument against binding a minority of creditors to a composition deed would apply equally to the compositions, under sects. 230, 231, after the adjudication.

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Willes, in reply, was stopped by the Court.

JERVIS C. J. There must be judgment for the plaintiff in error. The question turns principally on sect. 224 and those immediately following, although we are in some measure assisted by the sections preceding and following them. It is not to be expected, certainly not

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to be presumed, that in an Act relating to bankruptcy, a proceeding essentially founded on the distribution of the bankrupt's effects, we should find an exemption of the estate from distribution: we should at least require a strong argument to convince us that this was intended. Now the utmost that can be said here is that the enactment is doubtful. I cannot help expressing my regret that the case is brought here in its present shape, and that the Court of Queen's Bench, feeling a doubt, did not adopt the ordinary mode of deferring to the opinion of a court of coordinate jurisdiction, leaving the defendant to bring the case before the Court of Error. We are somewhat embarrassed by the conflicting decisions: but I must put the best construction that I can upon the Act. The clauses "with respect to arrangements by deed" are, I believe, new. Now, if we compare these with the clauses in which "composition" is expressly mentioned, we may be led to infer that "arrangement" is something different. We cannot, however, be entirely guided by that. The natural meaning of the word "arrangement" is "setting in order:" but we find, from the series of sections "with respect to arrangements between debtors and their creditors under the superintendence and controul of the Court," that it may comprehend compositions. We are thus driven to extract the meaning from the clause itself, sect. 224. That makes effectual "every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six sevenths in number and value of those creditors whose debts amount to 10*l*. and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, in-

spection, conduct, management, and mode of winding up his estate, or all or any of such matters, or any matters having reference thereto,"—I stop there, without at present referring to the words "subject to the conditions hereinafter mentioned." I wish to consider whether the words "all or any of such matters" apply only to the words "distribution" &c., which immediately precede them, or to the whole of what has preceded. If they apply to the whole, that is to say, if a deed is good which touches only the release of a trader from his debts, then the six sevenths of the creditors have the power of making effectual a simple release. But, if we separate the words "and the distribution" down to "reference thereto" from what precedes, then it is a deed touching the distribution, the winding up, and so on, as well as the release, which is to be effectual; and thus the statute will make the distribution and the winding up a requisite in the transaction. The deed, to be good, must touch the trader's liabilities, and his release therefrom, and the distribution, or the inspection, or the management, and the mode of winding up the estate. Now that is so reasonable a result, and so like what we should expect to find, that a strong presumption arises in its favour. But, on reading forward, the intention of the Legislature is clear. The words "subject to the conditions hereinafter mentioned" ingraft what follows. See, then, what does follow, especially sections 228, 229. By sect. 228, creditors are to have the rights of set-off, mutual credit, lien and priority; and there is also to be a distribution of joint and separate assets, "in like manner as in bankruptcy." Set-off might indeed be allowed upon each construction of the statute, but lien would not, inasmuch as lien cannot be subjected to a composition. Neither would priority (which would arise

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in the case of wages); because that gives the party entitled his whole debt, not a rateable part. If then the deed is to be subject to these conditions, it is void if it defeats priority, and void if it defeats distribution. So, again, with respect to sect. 229, that enables a creditor, being dissatisfied with the administration of the estate, to appeal to the Court, and therefore assumes that the estate is to be administered. I consider, therefore, that on the expressions I have already stated no doubt arises as to the construction of the statute. But, if there were a doubt, we should require strong words to defeat the right to distribution. We must therefore say that a deed which does not, in some way, refer to a distribution and winding up is void.

PARKE B. I am of the same opinion. On looking at all the clauses, it appears to me that sect. 224, and the following, apply to those cases only where six sevenths of the creditors to the amount of 10*l*. make some arrangement as to the disposal of the entire estate among the creditors. The words "arrangements by deed" (which appear for the first time, I think, in this Act of Parliament) mean strictly a putting in order. According to modern usage, they may mean agreements. But, when the question is, whether they here comprehend an agreement which may exclude the distribution of the whole estate, we should require, before adopting such a construction, stronger words than we here find following the introduction of the term "arrangements by deed." Looking at the whole of this branch of the statute, I quite concur in the opinion that what is intended is merely a distribution by consent. But, when I look at the rest, I see that where it is intended that there shall be a composition clear words are used,

both in what precedes and what follows this part; so that the framer of the Act knew what were the words proper for describing a composition. In the case of "composition after adjudication of bankruptcy," there is to be a notice of twenty one days and a consent of nine tenths of the creditors to a certain amount, to deprive the non-consenting creditors of their right to enforce their whole debts. When it takes place, by the earlier sections, under the superintendence of the Court, there must be the consent of three fifths of the creditors to a certain amount: and then the whole takes place under the superintendence of the Court, which can satisfy itself whether the arrangement ought to be made, and which has full power of discovery, and may direct all the estate to be received by the official assignee; so that all is, in this case, under the controul of the Court. But in the case of "arrangements by deed" no means are provided for giving the general creditors knowledge; nor is there anything which can lead us to suppose that the Legislature meant to give the six sevenths of the creditors the power of binding all by a composition deed. But all is quite reasonable if we suppose that nothing is meant but an arrangement for the management of the whole property. I therefore concur with the Chief Justice of the Common Pleas in the opinion that there are no words to shew that the Legislature meant the non-assenting creditors to be bound without distribution. The six sevenths may make what arrangements they think fit for management of the estate by a trustee or by the bankrupt himself, subject to the complaint of a dissatisfied creditor.

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ALDERSON B. What the Legislature seems to me to have meant is, that the six sevenths may make such

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arrangements as they choose to adopt for the distribution of the whole estate according to the Act. That gives full effect to the words without inferring any improper power.

MAULE, CRESSWELL and TALFOURD Js., and PLATT and MARTIN Bs., concurred.

Judgment reversed (a).

(a) See the next case.

Tuesday,
January 25th.

THOMAS COOPER and GEORGE COOPER *against*
WILLIAM HENRY THORNTON.

A deed signed by six sevenths of creditors to the amount of 10*l.* and upwards is not valid, under stat. 12 & 13 *Vict. c. 106. s. 224.*, though it conveys the debtor's whole estate to trustees, if it empowers them to give back to the debtor effects to the value of 20*l.*

DEBT for 150*l.*: 50*l.* for goods sold and delivered; 50*l.* for money paid; and 50*l.* for money due on an account stated: damages 10*l.*

Plea 1. Except as to 31*l.* 18*s.* 9*d.*: Never indebted. Issue thereon.

2. As to the said 31*l.* 18*s.* 9*d.*: That, before and at the time of the making of the indenture after mentioned, and for six calendar months and upwards before the suspension of payment by defendant as after mentioned, defendant was a trader, to wit a grocer, liable to the bankrupt laws, and liable to become bankrupt under the bankrupt laws, and within the meaning of the statute after mentioned. That, before and at the time of making the said indenture, he was indebted to the parties of the third part to the indenture, and to divers other persons, in divers sums of money, and was unable to pay the same in full: and that defendant, before the time of making the indenture, and after the passing and coming into operation of the statute after mentioned, and after

the commencement of this suit, and before the day of pleading this plea, to wit on 9th *August* 1852, suspended payment. And thereupon, by a certain indenture made after the commencement of this suit, and after the passing and coming into operation of "The Bankrupt Law Consolidation Act, 1849" (a), and which indenture bore date on 9th *August* 1852, and was made between defendant of the first part, *William Curtis* and *William Roberts* (described therein as trustees for themselves and the rest of the creditors of the defendant) of the second part, and the several other persons whose names and seals were thereunto subscribed and set as after mentioned (being respectively creditors of defendant, or the duly authorized agents of such creditors) of the third part: After reciting that defendant was justly and truly indebted unto the said parties of the second and third parts to the indenture, in the several sums of money set opposite to their respective names, in the schedule to the said indenture written, and, being unable to pay the same in full, he had proposed and agreed to assign all his estate and effects unto the said trustees for the benefit of his creditors, as thereafter mentioned: It was witnessed that, in pursuance of the said agreement, and in consideration of the premises and 5s. of lawful &c. to defendant in hand paid by the said trustees at or before the execution of the indenture, defendant did, by the said indenture, bargain, sell, assign, transfer and set over unto the said trustees, their executors, administrators and assigns, all and every the stook in trade, goods, wares, merchandizes, household furniture, fixtures, plate, linen, china, books of account, debts, sum and

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sums of money, and all securities for money, vouchers and other documents and writings, and all other the personal estate and effects whatsoever and wheresoever of defendant, in possession, reversion, remainder or expectancy, together with full and free possession, right and title of entry in and to all and every of the messuages or tenements and premises wherein the said several effects then were: To have and to hold the said stock in trade, and all other the estate, effects and premises thereby assigned, or intended so to be, unto the said trustees, their executors, administrators and assigns, absolutely; upon trust, nevertheless, to collect and receive, or sell and dispose of, the said thereby assigned premises, and every part thereof, either by public sale or private contract, and in one or more lot or lots with liberty to give any credit for the same, or to take any security for the purchase money or any part thereof, as to the said trustees, their executors, &c., should seem proper: and upon trust, out of the moneys to be received by virtue of the indenture, to pay all the costs and expenses of proposing, preparing, engrossing and executing the indenture, and attending or relating to the said thereby assigned premises, or the trusts thereby created; and, in the next place, to pay, retain and satisfy, rateably and proportionably, and without any preference or priority, to themselves, the said trustees, and their partners, and the other persons parties thereto of the third part, the several debts or sums set opposite to their respective names in the said schedule thereto; subject to the covenant thereafter contained for verifying the amount thereof; and to pay the residue (if any) of the said moneys unto defendant, his executors, administrators and assigns. And it was thereby pro-

vided that it should be lawful for the said trustees to make to defendant such allowance, or return to him such part of his household furniture or effects, not exceeding the value of 20*l*., as they might deem expedient; and also to employ defendant, or any other person or persons, in winding up the affairs of defendant, and in collecting and getting his estate and effects thereby assigned, and in carrying on his trade (if thought expedient by them), and to allow defendant, or any other person or persons, so employed as aforesaid, out of the said trust estate such sum and sums as to the said trustees should seem proper. And defendant did thereby make, constitute and appoint the trustees, and the survivors and survivor of them, and the executors, &c., to be his true and lawful attorneys &c. (to demand all debts, and other the premises assigned, sign receipts, commence actions, liquidate accounts relating to the trust estate, and to use defendant's name for these purposes; and defendant covenanted to ratify what they should lawfully do; the receipts of the trustees to be effectual discharges). And it was thereby further provided, covenanted and agreed, by and between the said several parties to the indenture, that it should be lawful for the trustees, at the expense of the trust estate, to require the amount of any debt or debts of any or either of the several creditors, parties thereto, to be verified by solemn declaration, or in such other manner as to the trustees should seem expedient; and, in the event of any such creditor or creditors refusing or failing so to verify his, her or their debt or debts, then such creditor or creditors, so refusing or failing as aforesaid, should lose all benefit, dividends and advantage to be derived from or otherwise claimed under the indenture, anything

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therein contained to the contrary notwithstanding. And thereupon the trustees were thereby authorized and empowered to pay such last mentioned dividends or dividend unto the defendant; and the trustees were authorized or empowered to pay, or make such agreements with, the creditors whose debts were under 5*l*. as they, the trustees, might deem expedient. And it was thereby further declared and agreed that any resolution signed by the majority in number and value of the said creditors, parties thereto, should be binding on all the several parties thereto, and should be effectual for the allowance and passing of the accounts of the said trustees, and for discharging them from the trusts thereof, and from all claims and demands in respect thereof. And that all questions relating to the said trust estate should be decided according to English bankrupt law. And, further, that the trustees should not be answerable for any acts or receipts of each other, or for any loss or damage which might happen in the execution of the aforesaid trusts, without their own respective wilful defaults. And that, whenever the funds arising from the trust estate should amount to 100*l*. or upwards, the same should be paid into the Bank of *The Gloucestershire Banking Company*, at *Gloucester*, in the names of the trustees, and the cheques or orders for drawing out the money, or any part thereof, should be signed by both of the trustees. And it was lastly witnessed, in and by the said indenture, that, in consideration of the premises and of the assignment thereinbefore contained, the said several creditors, parties thereto of the second and third parts, subject to the proviso next thereafter contained, did, and each of them did, acquit, release and for ever discharge defendant of and from all and all manner of debt and debts, sum and sums of money, bills, bonds,

notes, accounts, reckonings, judgments, executions, actions, suits, claims and demands whatsoever, which they, the said releasing parties, or any or either of them, their or any or either of their partner or partners, then had, or thereafter might have, against defendant, his executors or administrators, for or in respect of any debt, transaction, matter or thing up to the day of the date of the indenture. And it was thereby provided, expressly declared, and agreed, that, in case defendant had concealed or kept back any part of his estate and effects to the value of 20*l*. (except the linen and wearing apparel of himself and his family), then the release thereinbefore contained should be void and of no effect. Allegation: that, at the time of the making of the indenture, defendant had not, nor was he entitled to, nor has he since had or been entitled to, any real property whatsoever; and that he assigned, by the indenture, all the property whereof or whereto he was, at the time of the making of the indenture, in any way possessed or entitled. That, after the commencement of this suit, to wit at the time of the making of the indenture, the same was signed and sealed by defendant; and divers, to wit fifty, of the creditors of defendant, by themselves, signed the said deed and subscribed their names, and set their seals thereto; and divers, to wit fifty, others of the said creditors, by their duly authorized agents, respectively signed the said deed and subscribed their names, and set their seals thereto: and that the indenture, at the time of making thereof, and at all times, was and is an arrangement by deed, and a deed of arrangement between defendant and his creditors, within the meaning of the provisions of the said act with respect to arrangements by deed; and that the said

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creditors, by whom and on behalf of whom the deed was so signed and executed as aforesaid, were six sevenths in number and value of the creditors of the defendant, within the meaning of the said provisions of the said act, whose debts amounted, within the meaning of the said provisions, to the sum of 10*l*. and upwards, accounting every creditor as a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from defendant, appeared to be the balance due to him. And that the said creditors, by whom and on behalf of whom the deed was so signed as aforesaid, thereby assented to the deed, and to be bound thereby. That plaintiffs were, at the time of the making of the said deed, creditors of defendant in respect of the said debt and cause of action in the introductory part of this plea mentioned, within the meaning of the provisions of the said act; and that, at the said time of making the said deed, the amount in the introductory part of this plea mentioned was a debt then due from the defendant to the plaintiffs within the meaning of the said deed; and that, after the said suspension of payment by defendant, and after the deed had been so signed and executed as aforesaid, and the names of such majority of creditors had been so subscribed, and seals so affixed, in manner aforesaid, plaintiffs had notice from defendant of his suspension of payment, and of the deed of arrangement, and were then requested by defendant to sign and execute the deed; and plaintiffs then might and could, if they would, have signed and executed the same, as parties thereto of the third part. And that three calendar months from the time when the plaintiffs had such notice of the defendant's suspension of payment, and of the deed, expired before

the pleading of this plea. And that defendant, and the said parties of the second part, have, at all times since the making of the deed, well and truly observed and performed, in all respects, the covenants in the deed contained on their parts to be observed and performed: and that *William Curtis* and *William Roberts*, parties to the deed, of the second part, did, at and at all times after the making of the indenture, assent to the terms thereof, and did act as such trustees and in the trusts of the indenture. That, by reason of the premises, and by force of the statute aforesaid, the deed (the same having been, at all times from the making and executing the same, and being still, in force) became and was, and is, as obligatory on plaintiffs as if they had duly signed and executed the same. And, by reason of the premises, defendant, before and at the time of the pleading of this plea, became and was released and discharged from the said causes of action in the introductory part of this plea mentioned.

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Demurrer. Joinder.

Prentice, for the plaintiffs. The plea is bad, according to the decision, in the Exchequer Chamber, of *Tetley v. Taylor* (a), which affirmed the principle acted upon in *Drew v. Collins* (b). A deed, under stat. 12 & 13 Vict. c. 106. s. 224., is not valid against non-assenting creditors unless it provide for the distribution of the whole estate. Here the trustees have power to return

(a) *Ante*, p. 521.

(b) 6 Exch. 670. *Prentice* referred to *Bibby v. Larpent*, in the Queen's Bench, November 10th, 1852, before Lord Campbell C. J., Coleridge, Wightman and Erle Js. In this case there was a demurrer to a plea similar to that in *Tetley v. Taylor* (*ante*, p. 521). The Court declared themselves bound by the decision in that case, and refused to discuss the reasoning on which it was founded. Judgment for plaintiff. A writ of error is now pending in *Bibby v. Larpent*.

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to the debtor part of the estate to the value of 20*L*.
[He then stated other objections, upon which the Court pronounced no decision.]

Macnamara, contra. The Court is, undoubtedly, bound by the decision of *Tetley v. Taylor* (a), but not by the dicta pronounced in that case. There the debtor was to pay only 7*s.* 6*d.* in the pound: the deed was therefore one of composition. Here all the effects are to be distributed: this is not a composition deed. It was, at the least, intended by the Legislature to leave to the six sevenths of the creditors some discretion as to the management; *Phillips v. Surridge* (b). If not, the slightest deviation from the ordinary provisions for bankruptcy would invalidate the deed. The deed will be interpreted favourably: it may mean only that the debtor is to have the twenty pounds' worth if he pays 20*s.* in the pound. [Lord Campbell C. J. He would have that at any rate: you give no effect to the proviso.] It is no more than a mode of distribution. [Lord Campbell C. J. It is a distribution between debtor and creditor. *Crompton J.* The discretion given by the deed seems to be a discretion whether there shall be a distribution or not.]

Prentice, in reply, was stopped by the Court.

LORD CAMPBELL C. J. This objection is fatal: we need not consider the others. The debtor may receive back the sum of 20*L*., whether or not the estate pays 20*s.* in the pound. That is not a distribution of the whole estate, which is necessary according to *Tetley v. Taylor* (a).

COLERIDGE, WIGHTMAN and CROMPTON Js. concurred.

Judgment for plaintiff.

(a) Ante, p. 521.

(b) 1 *Low. M. & P.* 458. 472.

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RICHARD SILL *against* The QUEEN, in error.Wednesday,
January 26th.

THE plaintiff in error was indicted at the *Middlesex* Sessions. The first count of the indictment charged that he, on &c., at &c., unlawfully, knowingly, &c., did falsely pretend to one *Henry Broome* that &c. (stating the pretences). By means of which said false pretences the said *Richard Sill* did then and there unlawfully obtain from the said *Henry Broome* two bills of exchange, of the value, and for the payment, of 120*l.*, respectively, and one bill of exchange, of the value, and for the payment, of 240*l.*, with intent then and there to cheat and defraud him, the said *Henry Broome*, of the same. Whereas, in truth &c. (negating the pretences). There were two other counts, which, so far as regards the point decided, did not vary from the first. The indictment having been transmitted (a) to the Central Criminal Court, the defendant pleaded Not guilty. Issue thereon. Verdict: Guilty. The defendant was sentenced to be imprisoned and kept to hard labour for two years, the judgment being entered separately on each count.

An indictment for obtaining goods by false pretences is bad on error if it does not state to whom the goods belonged. The defect is not cured by stat. 14 & 15 *Vict. c. 100*.

On this judgment the defendant brought error. Joinder.

(a) In *Trinity* term (June 7) 1852, *Doyle*, for defendant, moved for a certiorari, to remove this indictment to the Central Criminal Court. *W. J. Metcalfe* shewed cause in the first instance, contending that the certiorari was taken away by stat. 7 & 8 *G. 4. c. 29. s. 53*. *Doyle*, contra, relied on stat. 4 & 5 *W. 4. c. 36. s. 16*. The Court (Lord Campbell C. J., Coleridge and Erle Js.) said that a writ might issue, to transfer to the Central Criminal Court, though not a certiorari in the ordinary sense of the word. "Ordered: That a writ of certiorari issue, directed to the Keepers of the Peace and Justices" &c., "to remove all and singular indictments of whatsoever misdemeanours, whereof *Richard Sill* is before them indicted, into the Central Criminal Court."

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H. J. Hodgson, for the plaintiff in error (defendant below). The indictment is bad upon error for not shewing whose property the articles obtained were; *Regina v. Norton (a)*, *Rex v. Martin (b)*. [*W. J. Metcalfe*, for the Crown, stated that he relied upon stat. 14 & 15 *Vict. c. 100.*, and admitted that, before that statute, the indictment would have been bad.] Sect. 25 of that statute enacts that "every objection to any indictment for any formal defect apparent on the face thereof shall be taken, by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards;" and that the Court may amend such defect. But this is an objection to the want of a substantive allegation: Lord *Denman* C. J., in *Rex v. Martin (a)*, points out that the goods, for anything that was shewn, might be those of the defendant himself. [Lord *Campbell* C. J. Would that necessarily be a defence?] The only section of the statute relating to ownership is the first: that allows the Court at the trial to amend (and if necessary to postpone the trial), where there is a variance between the indictment and the evidence in the name or description of any person or persons "stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein," "or in the ownership of any property named or described therein." But that power must be exercised before error brought: and, further, the clause assumes that there ought to be the allegation, and provides only for a mistake in fact. Sect. 8 relates directly to the offence of obtaining goods under false pretences: but it does not dispense with the allegation as to the

(a) 8 C. & P. 196.

(b) 8 A. & E. 481.

property: it enacts only that it shall be sufficient "to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person." The precedent given in Mr. *Greaves's* edition of *Lord Campbell's Acts*, No. 34., contains the allegation as to property.

The Court then called on

W. J. Metcalfe, for the Crown. Under sect. 25 the question is, whether this be a defect of form or of substance. [*Crompton J.* How can an allegation be formal which must be proved as laid? *Lord Campbell C. J.* If you had laid the goods to be the goods of *J. S.*, you must have proved that.] If necessary, the Court may now amend. [*Coleridge J.* No: that must be done before verdict, under sect. 1; the trial is to "proceed" after the amendment.] Sect. 25 must have in view something more than matters entirely immaterial: those are sufficiently provided for by sect. 24; sect. 20 contains an instance, in one particular class of offences, of the relaxation in point of fulness of allegation which the Legislature intended to introduce: and the Court, in disallowing this objection, will be following the analogy of sect. 8: the person defrauded may be assumed to be ordinarily the owner of the goods. It seems from the language of the Court in *Regina v. Parker (a)* that the allegation does not affect the gist of the offence.

H. J. Hodgson, in reply. The defect was there held fatal. Sect. 25 was passed for the purpose of meeting a particular case: the Court will not extend the enactment to other cases.

(a) 3 Q. B. 292.

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Lord CAMPBELL C. J. I am reluctantly compelled to yield to the objection. It is admitted that, before stat. 14 & 15 *Vict. c. 100.*, it was necessary to lay the property of the goods in some one. I might have thought that no injustice would have been done by dispensing with such necessity. But there have been solemn decisions by which I feel bound: and therefore the only question is, whether the statute alters the law. Now sect. 1 relates to variances only: this is no variance. Then sect. 8, upon which a plausible argument was suggested, shews that the Legislature intended only to make it unnecessary to specify the individual defrauded, making it sufficient to shew that there was an intent to defraud. But that does not obviate the necessity of shewing to whom the goods belonged. Then sect. 25 would prevent the defendant from now taking the objection, if the omission were matter of form. But how can we call an allegation formal which must be proved as alleged? Had there been an allegation laying the property in the wrong person, that, under sect. 1, might have been amended at the trial: but, without such amendment, the defendant must have been acquitted. That being so, I cannot say that the allegation is formal. The law therefore stands as before the statute. I regret the result very much: and I hope that, before long, the Legislature will put an end to this nicety, among others.

COLERIDGE J. The real question is, whether it is necessary to state the ownership in indictments for unlawfully obtaining property. The doubt I had was whether, under sect. 8, it was necessary to state it at all: if it be necessary, the statement is not formal. I think that sect. 1

shews it to be necessary. That section is addressed, among other matters, to a variance in such a statement. Now that is not to be amended as a matter of course: but the enactment assumes that, even where the variance is immaterial to the merits of the case, an amendment is necessary. That provision would surely not have been inserted if it was unnecessary to state the ownership at all. Looking then at sect. 1 together with sect. 8, it seems to me to be still necessary to state the ownership. If so, and if it be necessary that, when it is incorrectly stated, there must be an amendment in accordance with the proof, the statement cannot be formal.

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WIGHTMAN J. It seems agreed that the question arises under stat. 14 & 15 *Vict. c. 100*. Had not that passed, we should have been bound by the decisions which have been mentioned. The only doubt I had was, whether the allegation was rendered unnecessary by sect. 8, which provides that, in an indictment for obtaining money by false pretences, it shall be sufficient to allege an intent to defraud generally, without naming any particular person. I cannot say that even now I might not have doubted whether it was necessary to state that the goods belonged to any particular person. But the decisions before the Act are so strong as to the necessity of this allegation that I feel obliged to give way to them; and it follows from them that the allegation is a distinct and substantial one, and therefore not within the language of the statute.

CROMPTON J. I also am of opinion that the indictment is defective, and that the defect is not aided by the statute. Before the statute it was necessary to state

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both the particular person to whom the property belonged and the particular person whom it was intended to defraud. In all cases where goods are taken by larceny, actual or constructive, it is necessary to allege to whom they belong: and, even if there had been no decision on the point, I own I should have felt no doubt that this was the law before the statute. However, the decisions have been given. Then, as to the statute, the principal reliance is placed on sect. 8. But that has reference entirely to questions turning on the mode of alleging the intention to defraud: and the object was to get rid of the difficulty on that point: the enactment was not aimed at the allegation of property. Then sect. 25 applies only to formal defects. I agree that sect. 1 leads to the inference that this defect is not formal.

Judgment reversed.

Wednesday,
January 26th.

The QUEEN against NEWMAN, D.D.

Where a justification is pleaded, under stat. 6 & 7 Vict. c. 96.

CRIMINAL Information. A motion was made in this case in last *Michaelmas* term, reported

s. 6., to an indictment for a defamatory libel, and the libel contains several distinct imputations, and the plea alleges the truth of all and is traversed generally, if the evidence fail as to any one of them the verdict will be entered generally against the defendant.

Therefore, where, upon the trial of an issue upon a plea justifying the whole of such a libel, evidence was offered in support of some only of the imputations, and the jury found that one only of the imputations upon which evidence was offered was proved, the verdict was entered up for the Crown on that issue generally; and the Court refused to grant a new trial on the ground that the finding as to the other issues upon which evidence was offered was against the weight of evidence.

Where the defendant, having pleaded such a plea, is convicted, the Court, in apportioning punishment, looks into the evidence given at the trial, for the purpose of considering whether the guilt of the defendant is aggravated or mitigated by the plea and the evidence.

In such a case the defendant may, in mitigation of punishment, shew by affidavit that, after the publication, but before plea pleaded, information was given to him which, if true,

ante, p. 268 : but it is necessary, for the purpose of the discussion and decision in the following report, to give the record more fully. The information charged:

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That *John Henry Newman* D.D., contriving &c. to injure and vilify one *Giovanni Giacinto Achilli*, and to bring him into contempt &c., heretofore, to wit on &c., at &c., did falsely and maliciously compose and publish, and cause &c., a certain false, scandalous, &c. libel, containing (amongst other things) divers false, scandalous, &c. matters and things of and concerning the said *G. G. A.*, according to the tenor and effect following : that is to say :

"And in the midst of outrages such as these, my brothers of the Oratory, wiping its mouth, and clasping its hands, and turning up its eyes, it trudges to the Town Hall to hear Dr. *Achilli*" (meaning the said *G. G. Achilli*) "expose the Inquisition. Ah, Dr. *Achilli*" (meaning *G. G. A.*) : "I" (meaning the said *J. H. Newman*) "might have spoken of him" (meaning *G. G. A.*) "last week, had time admitted of it. The Protestant world flocks to bear him" (meaning *G. G. A.*) "because he" (meaning *G. G. A.*) "has something to tell of the Catholic Church. He" (meaning *G. G. A.*) "has a something to tell, it is true ; he" (meaning *G. G. A.*) "has a scandal to reveal ; he" (meaning *G. G. A.*) "has an argument to exhibit ; it is a simple one, and a powerful one, as far as it goes ; and it is one. That one argument is himself" (meaning *G. G. A.*) "It is his presence" (meaning the presence of *G. G. A.*) "which is the triumph of Protestants ; it is the sight of him" (meaning *G. G. A.*) "which is a Catholic's confusion. It is indeed our great confusion that our Holy Mother could have a priest like him" (meaning *G. G. A.*) : "he" (meaning *G. G. A.*) "feels the force of the argument ; and he" (meaning *G. G. A.*) "shews himself" (meaning *G. G. A.*) "to the multitude that is gazing on him" (meaning *G. G. A.*) "Mothers of families, he" (meaning *G. G. A.*) "seems to say, gentle maidens, innocent children, look at me" (meaning *G. G. A.*) ; "for I" (meaning *G. G. A.*) "am worth looking at. You do not see such a sight every day. Can any church live over the imputation of such a production as I" (meaning *G. G. A.*) "am." (1.) (a) "I" (meaning *G. G. A.*) "have been a Catholic and an infidel" (he, the said *J. H. N.*, thereby then meaning that the said *G. G. A.* had in fact been a Catholic and an infidel). (2.) "I" (meaning *G. G. A.*) "have been a Roman priest and a hypocrite" (*J. H. N.* thereby meaning that *G. G. A.* had in fact been a Roman priest and a hypocrite). (3.) "I have been a profligate under a cow!" (*J. H. N.* thereby meaning that *G. G. A.* had been in fact a profligate).

would have supported an allegation in the plea, evidence having been given, at the trial, to account for the non-production of proof, but no evidence in support of the allegation itself.

But, where a document, which would have supported the plea, has been rejected at the trial for want of authentication by the place of custody or otherwise, its contents are not admissible in confirmation of the defendant's own affidavit that such a document was communicated to him before plea pleaded.

(a) The figures inserted in the copy of the information and plea were not in the record ; but the different passages were referred to, according to the figures, by the Court and by the counsel on each side.

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(4.) "I" (meaning G. G. A.) "am that father *Achilli* who, as early as 1826, was deprived of my faculty to lecture for an offence which my superiors did their best to conceal" (*J. H. N.* thereby meaning that G. G. A. had had a faculty to lecture, and had been deprived of the same for an offence which his, G. G. A.'s, superiors did their best to conceal). (5.) "And who, in 1827, had already earned the reputation of a scandalous friar" (*J. H. N.* thereby meaning that G. G. A. had in fact been a scandalous friar). (6.) "I" (meaning G. G. A.) "am that *Achilli* who in the diocese of *Viterbo*, in February 1831, robbed of her honour a young woman of eighteen" (*J. H. N.* thereby meaning that G. G. A. had in fact robbed of her honour a young woman of eighteen years of age): (7.) "who" (meaning G. G. A.), "in September 1833, was found guilty of a second such crime in the case of a person of twenty eight" (*J. H. N.* thereby meaning that G. G. A. had in fact been found guilty of robbing of her honour another woman of the age of twenty eight years, and had in fact been guilty of that misconduct): (8.) "and who" (meaning G. G. A.) "perpetrated a third in July 1834, in the case of another aged twenty four" (*J. H. N.* thereby meaning that G. G. A. had in fact robbed of her honour another woman of the age of twenty four years). (9.) "I" (meaning G. G. A.) "am he who" (meaning the said G. G. A.) "afterwards was found guilty of sins similar or worse in other towns of the neighbourhood" (*J. H. N.* thereby then meaning that the said G. G. A. had in fact been found guilty of sins similar to, or worse than, the said alleged offences of robbing the said women of their honour, and had in fact been guilty of such sins). (10.) "I" (meaning G. G. A.) "am that son of St. *Dominic* who" (meaning G. G. A.) "is known to have repeated the offence at *Capua* in 1834 or 1835, (11.) and at *Naples* again in 1840, in the case of a child of fifteen" (*J. H. N.* thereby meaning that G. G. A. had in fact at *Capua* robbed of her honour some other woman, and had in fact at *Naples* robbed of her honour some female child of fifteen years of age). (12.) "I" (meaning G. G. A.) "am he who" (meaning G. G. A.) "chose the sacristy of the church for one of these crimes, and *Good Friday* for another" (*J. H. N.* thereby meaning that G. G. A. had in fact robbed one of the said female persons of her honour in the sacristy of a church, and had in fact robbed another of the said female persons of her honour on *Good Friday*). (13.) "Look on me" (meaning the said G. G. A.), "ye mothers of England, a confessor against Popery; for ye ne'er may look upon my like again. I" (meaning G. G. A.) "am that veritable priest who" (meaning G. G. A.), "after all this, began to speak against, not only the Catholic faith, but the moral law, and perverted others by my teaching" (*J. H. N.* thereby meaning that G. G. A. had in fact spoken, not only against the Catholic faith, as aforesaid, but also against the moral law, and perverted others by his, G. G. A.'s, teaching). (14.) "I" (meaning G. G. A.) "am the cavaliere *Achilli* who" (meaning G. G. A.) "then went to *Corfu*, made the wife of a tailor

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faithless to her husband, and lived publicly and travelled about with the wife of a chorus singer" (J. H. N. thereby meaning that G. G. A. had in fact committed adultery with the wife of a tailor, and also with the wife of a chorus singer). (15.) "I" (meaning G. G. A.) "am that professor in the Protestant College at *Malta* who" (meaning G. G. A.), "with two others, was dismissed from my post for offences which the authorities cannot get themselves to describe" (J. H. N. thereby meaning that G. G. A. had been dismissed from a professorship in a Protestant college at *Malta* for offences which the authorities of such college could not get themselves to describe, and had in fact been guilty of such offences). "And now attend to me" (meaning G. G. A.), "such as I" (meaning the said G. G. A.) "am: and you shall see what you shall see about the barbarity and profligacy of the Inquisitors of Rome." (16.) "You" (meaning G. G. A.) "speak truly, O *Achilli*" (meaning G. G. A.): "and we" (meaning, amongst others, J. H. N.) "cannot answer you" (meaning G. G. A.) "a word. You" (meaning G. G. A.) "are a priest. You" (meaning G. G. A.) "have been a friar. You" (meaning G. G. A.) "are, it is undeniable, the scandal of Catholicism, and the palmary argument of Protestants by your extraordinary depravity." (17.) "You" (meaning G. G. A.) "have been, it is true, a profligate, an unbeliever and an hypocrite." (18.) "Not many years passed of your" (meaning G. G. A.'s) "conventual life, and you" (meaning G. G. A.) "were never in choir, always in private houses, so that the laity observed you" (meaning G. G. A.). (19.) "You" (meaning G. G. A.) "were deprived of your professorship. We" (meaning, amongst others, J. H. N.) "own it. "You" (meaning G. G. A.) "were prohibited from preaching and hearing confessions." (20.) "You" (meaning G. G. A.) "were obliged to give hush money to the father of one of your victims, as we" (meaning, amongst others, J. H. N.) "learn from the official report of the police of *Viterbo*." (21.) "You" (meaning G. G. A.) "are reported in an official document of the *Neapolitan* police to be known for habitual incontinency." (22.) "Your" (meaning G. G. A.'s) "name came before the civil tribunal of *Corfu* for your" (meaning G. G. A.'s) "crime of adultery." (23.) "You" (meaning G. G. A.) "have put the crown on your offences, by, as long as you could, denying them all. You" (meaning G. G. A.) "have professed to seek after truth, when you" (meaning G. G. A.) "were ravening after sin. Yes! you" (meaning G. G. A.) "are an incontrovertible proof that priests may fall and friars break their vows. You" (meaning G. G. A.) "are your own witness. But, while you need not go out of yourself for your argument, neither are you able. With you the argument begins: with you too it ends: the beginning and the ending you are, both. When you" (meaning G. G. A.) "have shewn yourself, you have done your worst and your all. You" (meaning G. G. A.) "are your best argument and your sole. Your witness against others is utterly invalidated by your witness against yourself. You" (meaning G. G. A.)

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"leave your sting in the wound. You" (meaning *G. G. A.*) "cannot lay the golden eggs; for you" (meaning *G. G. A.*) "are already dead." Which said false, scandalous, &c. libel the said *J. H. Newman* did then and there compose and publish, to the great damage, &c. of the said *G. G. Achilli*, in contempt &c., against the peace &c.

Pleas. 1. Not guilty. Issue thereon.

2. (1.) That, before the said composing and publishing &c., to wit on 1st January 1830, "and on divers other days and times before and after that time, the said *G. G. A.* had been and was an infidel, to wit at *Westminster* in the county of *Middlesex*." (2.) "That, before the said composing and publishing of the said alleged libel, to wit on the 1st day of January A. D. 1830, and on divers other days and times between that day and the time of the composing and publishing of the said alleged libel, to wit at *Westminster*" &c., "the said *G. G. A.* was a priest in holy orders conferred upon him according to the rites and ministration of the Church of *Rome*, and professed himself to be such priest, and undertook to exercise and perform, and did exercise and perform, the functions and duties of such priest, to wit at *Viterbo*, and at *Capua*, and at *Naples*, and elsewhere in parts beyond the seas, to wit at *Westminster*" &c. : "and, whilst the said *G. G. A.* was, and professed himself to be, such priest, and undertook to, and did, exercise and perform the said functions and duties as aforesaid, he, the said *G. G. A.*, did secretly abandon and disbelieve the peculiar doctrines of the Church of *Rome*, to wit in respect of, amongst other things, the character and office and authority of the priesthood, the prerogatives and authority of the Bishop and See of *Rome*, and the nature and effects of the Sacraments, the office of, and the reverence due to, the Saints, the power and authority of the bishops, the nature and effect of indulgences: and that he, the said *G. G. A.*, at the days and times aforesaid, though outwardly professing, in his said priestly character and functions, to observe and practice chastity and purity of life, according to his duty in that behalf, was privately guilty of committing, and did then commit, divers acts of fornication and impurity in this: that he, the said *G. G. A.*, committed the several acts of fornication, adultery and impurity hereinafter mentioned, whereby the maintenance and exercise of the said priestly character and functions in and by the said *G. G. A.* were hypocritical; and the said *G. G. A.* was, by reason thereof, a hypocrite." (3.) "That, before the said composing" &c., "to wit on the 1st day of January, A. D. 1826, and on divers other days and times between that day and the time of composing" &c., to wit at *Westminster*" &c., "the said *G. G. A.* had been, and was, a profligate under a cowl, to wit in this: that he, the said *G. G. A.*, was then a member of a certain order, to wit the order of *St. Dominic*, or *Friars Preachers*, in the said Church of *Rome*, and, as such, had bound himself by the vows of chastity, poverty and obedience; and also, as such, wore a certain cowl and habit, being the cowl and habit usually worn by persons members of the said order: and that he, the

said *G. G. A.*, whilst he was such member of the said Order, and wore the said cowl and habit as aforesaid, was guilty of divers acts of profligacy and immorality, to wit of the several sins of fornication and impurity hereinafter mentioned." (4.) "That, before the said composing" &c., "to wit on the 1st day of *January* A. D. 1826, the said *G. G. A.* had a certain faculty or authority to lecture, and was appointed lecturer in parts beyond the seas, to wit *Viterbo in Italy*, to wit at *Westminster*" &c.: "and, after the said *G. G. A.* had been so appointed lecturer, and whilst he had the said faculty or authority, and before the composing" &c., "to wit on the day and year last aforesaid, to wit at *Westminster* aforesaid, he, the said *G. G. A.*, committed a certain offence, and was guilty of certain misconduct, for and in respect of which he, the said *G. G. A.*, was then, and as early as the year of our Lord 1826, deprived of his said faculty or authority to lecture, to wit by a certain person then being the General or Superior of the said Order of *St. Dominic* or *Friars Preachers*, to which the said *G. G. A.* then belonged, to wit one *F. Velsi*, whose Christian or first name is to the said *J. H. N.*, otherwise than as aforesaid, unknown: but which said offence and misconduct were then concealed and suppressed by the said General or Superior, and were and are unknown to the said *J. H. N.*, although the said *J. H. N.* has used due diligence to ascertain the same." (5.) "That, before the said composing" &c., "to wit on the 1st day of *January* A. D. 1826, to wit at *Westminster*" &c., "the said *G. G. A.* was a friar, and member of the said Order of *St. Dominic* or *Friars Preachers*, and resided in a convent of that Order, to wit the convent of *Gradi*, in parts beyond the seas, at *Viterbo in Italy* aforesaid: and that it was the duty of the said *G. G. A.*, as such Friar and member of the said Order, to attend Divine service from time to time in the choir of the church of the said convent, wherein he so resided as aforesaid, and to avoid leaving the said convent, unless for necessary purposes or without the permission of his superiors in the said convent, and also to avoid frequent intercourse with persons not belonging to such Order, and visits to or at the houses of such persons; but the said *G. G. A.*, before the composing" &c., "to wit on the day and year last aforesaid, and on divers other days and times between that day and the time of his quitting the said convent, to wit at *Westminster*" &c., "neglected to perform his said duty, and failed, without any sufficient or proper excuse, to attend Divine service in the choir of the said church, although such service was then, from time to time, duly celebrated in the said church; and also, on divers days and times before the composing" &c., "to wit on the days and times last aforesaid, during the time in which the said *G. G. A.* so resided in the said convent of *Gradi* as aforesaid, he, the said *G. G. A.*, left the said convent for other than necessary purposes, and without the permission of his said superiors in the said convent, and had frequent intercourse with divers persons not belonging to the said Order, whose names are to the said *J. H. N.* as yet unknown; and which names the said *J. H. N.* has not

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had the means of ascertaining, although he has used due diligence to ascertain the same ; and visited the houses of those persons, to wit at *Viterbo* aforesaid, and thereby neglected and violated his duty as such Friar and member of the said Order as aforesaid, to wit at *Westminster*" &c.; "and gave general and public scandal by such his neglect and violation, to wit at *Viterbo* aforesaid ; and was there then generally and commonly reputed, and then already, to wit A.D. 1827, earned the reputation of, a scandalous Friar, to wit at *Westminster*" &c. (6.) "That, before the said composing" &c., "to wit on the 1st day of February, A.D. 1831, at a place beyond the seas, situate in the diocese of *Viterbo* in Italy, to wit at *Viterbo* aforesaid, to wit at *Westminster*" &c., "the said G. G. A. did debauch, seduce and carnally know a certain young woman, to wit one *Elena Valente*, then being chaste and unmarried, and being of the age, to wit, of eighteen years, and did then and there, by the means in that behalf aforesaid, rob her of her honour." (7.) "That the said G. G. A., before the said composing" &c., "to wit on the day and year last aforesaid, in parts beyond the seas, to wit at *Viterbo* aforesaid, to wit at *Westminster*" &c., "did debauch, seduce and carnally know a certain other woman, to wit one *Rosa de Alessandris*, then being chaste and unmarried, and then being of the age, to wit, of twenty eight years ; and then and there, by the means in that behalf aforesaid, robbed her of her honour ; and afterwards, and before the said composing and publishing of the said alleged libel, to wit on the 1st day of September, A.D. 1833, at *Viterbo* aforesaid, to wit at *Westminster*" &c., "the said G. G. A. was found guilty of having so debauched, seduced and carnally known and robbed of her honour the said last mentioned woman, to wit upon due enquiry and examination in that behalf held by and before one Bishop *Pianetti*, then being the Bishop of *Viterbo*, and having lawful jurisdiction and authority in that behalf." (8.) "That, before the said composing" &c., "to wit on the 1st day of July, A.D. 1834, in parts beyond the seas, to wit at *Viterbo* aforesaid, to wit at *Westminster*" &c., "the said G. G. A. did debauch, seduce and carnally know a certain other woman, then being chaste and unmarried, and being of the age, to wit, of twenty four years, whose name is to the said J. H. N. as yet unknown ; and which name the said J. H. N. has not had the means of ascertaining, although he has used due diligence to ascertain the same : and the said G. G. A. did then and there, by the means in that behalf aforesaid, rob the same woman of her honour." (9.) "That, after the day and year last mentioned, and before the said composing" &c., "to wit on the 1st day of January A.D. 1835, and on divers other days and times, whilst the said G. G. A. was resident at *Viterbo* aforesaid, to wit in the year last aforesaid, the said G. G. A. did, in parts beyond the seas, to wit at *Viterbo* aforesaid, and at places in the neighbourhood of *Viterbo* aforesaid, to wit at *Monte Fiasconi* and elsewhere in the neighbourhood of that place, to wit at *Westminster*" &c., "commit sins similar to, or worse than, the said sins and offences hereinbefore mentioned : to wit that he, the

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said *G. G. A.*, did then and there debauch, seduce and carnally know and rob of her honour a certain other woman, then being chaste and unmarried, to wit one *Vincenta Guerra*, and also a certain other woman, then being chaste and unmarried, whose name is to the said *J. H. N.* as yet unknown, and which name he, the said *J. H. N.*, has not yet had the means of ascertaining, although he has used due diligence in that behalf for ascertaining the same. And that he, the said *G. G. A.*, was afterwards, in parts beyond the seas, to wit at *Rome*, and in and before a certain Court there held, to wit the Court of the Holy Office or Inquisition, found guilty of the said several offences of debauching, seducing and carnally knowing the said several women hereinbefore respectively above mentioned, the said Court being then a court having lawful jurisdiction and authority to enquire into, and to hear and determine, the matters relating to the same offences." (10.) "That, before the said composing" &c., "on the 1st day of *January* A.D. 1835, the said *G. G. A.*, being then a Friar and member of the said Order of *St. Dominic* or *Friars Preachers*, in parts beyond the seas, to wit at *Capua*, to wit at *Westminster*" &c., "did debauch, seduce and carnally know a certain other woman then being chaste and unmarried, whose name is to the said *J. H. N.* as yet unknown, and which name the said *J. H. N.* has not been able to ascertain, although he has used due diligence in endeavouring to ascertain the same; and then and there, by the means in that behalf aforesaid, robbed the same woman of her honour." (11.) "And afterwards, and before the said composing" &c., "to wit on the 1st day of *January* A.D. 1840, in parts beyond the seas, to wit at *Naples*, to wit at *Westminster*" &c., "the said *G. G. A.* did debauch, seduce and carnally know one *Maria Giovanna Principe*, the daughter of a certain person, to wit one *Giuseppe Principe*, and being a female child of the age, to wit, of fifteen years, then being chaste and unmarried; and then and there, by the means in that behalf aforesaid, robbed her of her honour." (12.) "That the place in which the said *G. G. A.* did commit one of the said crimes, to wit the debauching, seducing and carnally knowing, and robbing of her honour, one of the said women so debauched and carnally known by him at *Viterbo* aforesaid, and so robbed of her honour as aforesaid, to wit the said *Rosa de Alessandris*, was and is the sacristy of a certain church, to wit the church of *Gradi* at *Viterbo* aforesaid; and that the day on which the said *G. G. A.* committed another of the said crimes, to wit the debauching, seducing and carnally knowing, and robbing of her honour, the said female child so debauched, seduced and carnally known by him at *Naples* as aforesaid, and so robbed of her honour as aforesaid, was in fact *Good Friday*, to wit in the said year of our Lord 1840 aforesaid." (13.) "That afterwards, and before the said composing and publishing of the said alleged libel, to wit on the 1st day of *January* A.D. 1841, and on divers other days and times between that day and the time of the composing" &c., "the said *G. G. A.*, being then a priest in holy orders, of the Church of

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Rome, in parts beyond the seas, to wit at *Rome, Capua, Naples and Malta*, to wit at *Westminster*" &c., "did speak and teach against the truth of divers doctrines of the Catholic faith, to wit the doctrines of the Eucharist, of Confession, and Absolution, and also against the validity and sanctity of vows taken and entered into by members of religious orders and professions in the Church of *Rome*: and the said *G. G. Achilli* did also, then and there, speak and teach against the laws of morality, to wit the moral obligation of chastity and continence; and did then and there allege and teach that fornication and unchastity were not sinful or unlawful; and, by so speaking and teaching, the said *G. G. A.* did then pervert certain persons, to wit one *Luigi de Sanctis*, and one *Fortunato Saccares*, the said *Rosa de Alessandris*, the said *Elena Valente*, and the said *Maria Giovanna Principe*, who had previously believed such doctrines, and obeyed such laws, from their said belief and obedience." (14.) "That, before the said composing" &c., "to wit on the 2d day of *July* in the year of our Lord 1843, in parts beyond the seas, to wit at *Corfu*, to wit at *Westminster*" &c., "the said *G. G. A.* seduced, debauched and carnally knew, and thereby made faithless to her husband, one *Marianna Crissaffi*, then being the lawful wife of one *Nicolo Garamone*, a tailor by trade; and afterwards, to wit on the 1st day of *August* A.D. 1843, and on divers other days and times between that day and the time of the composing" &c., "to wit at *Corfu* aforesaid, to wit at *Westminster*" &c., "the said *G. G. A.* did live publicly and cohabit with, and carnally know and commit adultery with, one *Albina*, then being the lawful wife of one *Vincenzo Coriboni*, who then exercised and carried on the trade or profession of a chorus singer: and then and there publicly cohabited in adulterous intercourse, and travelled, with the said *Albina*, so then being the wife of the said *Vincenzo Coriboni*, to wit from *Corfu* to the Island of *Zante*." (15.) "That afterwards, and before the said composing" &c., "to wit on the 1st day of *May* A.D. 1848, and for a certain period, to wit the period of twelve months before that day, the said *G. G. A.* held a certain office, to wit the office of Professor of Theology, in a certain Protestant College, to wit *St. Julian's College*, established in parts of Her Majesty's Dominions beyond the seas, to wit at *Malta*, to wit at *Westminster*" &c., "and, during the same period, did there commit the offence of hindering and frustrating an investigation then pending before certain officers of the said college, to wit one Mr. *Hadfield* and one Mr. *Brien*, concerning charges of fornication and other gross immorality against certain persons, to wit one *Fortunato Saccares* and one *Pietro Leonini*, then resident and employed in the said college (and in which said charges the said *G. G. Achilli* was also implicated), by sending away the said *Fortunato Saccares* from *Malta* aforesaid, to wit to *Sicily*, before the said investigation was concluded, and for the purpose of hindering and frustrating the said investigation, and of aiding and abetting the said *Fortunato Saccares* in eluding and frustrating the said investigation, and thereby endea-

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vouring to suppress and stifle the said charges. And thereupon afterwards, and before the said composing" &c., "to wit on the day and year last aforesaid, certain persons, to wit *Anthony* now Earl of *Shaftesbury*, then commonly called Lord *Ashley*, and others, being persons then acting as a committee of superintendence over the said College, and being the lawful authorities in that behalf, did dismiss the said *G. G. A.* from his said office of professor; and the said *G. G. A.* was then dismissed from his said office by the said last mentioned persons, as well for and on account of the said offence of hindering and frustrating the said investigation, as for other offences, to wit the said several acts of sin, fornication and immorality hereinbefore mentioned; but which the said last mentioned persons, so being such committee and authorities as aforesaid, were then unwilling to state or describe, and which they have hitherto forborne to state or describe, and cannot get themselves to describe specifically." (16.) "That, before the said composing" &c., "to wit in the several years of our Lord 1847, 1850 and 1851, the said *G. G. A.*, being resident in *London*, did then, to wit on the 1st day of *May* in the several years last aforesaid, and on divers other days whilst he so resided in *London*, to wit at *Westminster*" &c., "wickedly attempt to seduce and debauch one *Harriett Harris*, then being chaste and unmarried, and did also then and there behave and conduct himself lewdly and indecently, as well towards the said *Harriett Harris* as also towards certain other women, to wit one *Jane Legg*, and one *Sarah Wood*, and one *Catherine Gorman*, and one *Mademoiselle Fortay*; and that, by reason thereof, and of the said several other matters hereinbefore above set forth, the said *G. G. A.* was guilty of extraordinary depravity, and was and is the scandal of Catholicism by his, the said *G. G. A.*'s, extraordinary depravity so by him exhibited and practised as aforesaid." (17.) "That, before the said composing" &c., "to wit on the said several days and times aforesaid, to wit at *Westminster*" &c., "the said *G. G. A.* had been and was a profligate, to wit by the commission of the said several acts of profligacy and immorality hereinbefore above mentioned, and also had been and was an unbeliever and a hypocrite." (18.) "That, before the said composing" &c., "during the conventual life of the said *G. G. A.*, whilst he was an inhabitant of the said convent of *Gradi*, at *Viterbo* in *Italy*, to wit A.D. 1836, to wit at *Westminster*" &c., "he, the said *G. G. A.*, did, from time to time, and continually, absent himself from the choir of the church of the said convent during the times of the performing of Divine service therein, in the manner hereinbefore in that behalf mentioned, and was a frequenter of private houses, contrary to the rules and discipline of the said Order of *St. Dominic* or *Friars Preachers*; and had, by reason thereof, been observed by, and given offence to, divers lay persons not members of the said Order, whose names are to the said *J. H. Newman* unknown, although he has used due diligence in endeavouring to ascertain the same; and caused public scandal in the manner hereinbefore in that behalf mentioned as aforesaid." (19.) "That, before the said composing"

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&c., "to wit on the 16th day of *June* A.D. 1841, in parts beyond the seas, to wit at *Rome*, to wit at *Westminster*" &c., "by the judgment and consideration of a certain Ecclesiastical Court there, to wit the Court of the Holy Office or Inquisition, being a court having lawful jurisdiction and authority in that behalf, the said *G. G. A.* was for ever suspended from the celebration of mass, and disabled from any cure or direction of souls, and from preaching and hearing confessions, and from exercising his sacerdotal office." (20.) "That, before the said composing" &c., "and after the said *G. G. A.* had so debauched and carnally known and robbed of her honour the said young woman named *Rosa de Alessandris*, so debauched and carnally known and robbed of her honour by him at *Viterbo* as aforesaid, of the age of twenty eight years, to wit on the 1st day of *September*, in the year of our Lord 1833, to wit at *Viterbo* aforesaid, to wit at *Westminster*" &c., "the said *G. G. A.* was obliged to give a large sum of money, to wit the sum of fifty scudi, being a sum equal, in the current coin of this realm, to a certain large sum, to wit the sum of £10; and the said sum was then given by the said *G. G. A.* to the father of the said last mentioned young woman as hush money, and by way of compensation for the injury, damage and loss of services to the said father by reason of the said last mentioned young woman having been so debauched and carnally known and robbed of her honour by the said *G. G. A.* as aforesaid. And that, in and by the official reports and documents of and belonging to the officers of police at *Viterbo* aforesaid, it was and is reported and declared that the said *G. G. A.* had so given the said money as such hush money to the said father of the said last mentioned young woman as aforesaid." (21.) "That, before the composing" &c., "to wit on the 1st day of *January* A.D. 1839, to wit at *Westminster*" &c., "in and by a certain official document or report of the officers of police at *Naples* in *Italy*, and being amongst the archives and documents of the said *Neapolitan* police, the said *G. G. A.* was reported and declared to be known for habitual incontinency, to wit at *Naples* aforesaid, to wit at *Westminster* aforesaid." (22.) "That, after the said *G. G. A.* had so debauched and carnally known and made faithless to her husband the said *Marianna Crissaffi*, so being the wife of the said *Nicolo Garamone*, a tailor as aforesaid, and before the said composing" &c., "to wit on the 3d day of *July* A.D. 1843, to wit at *Westminster*" &c., "the name of the said *G. G. A.* came before the civil tribunal at *Corfu* aforesaid, for and in respect of the said crime of adultery, that is to say, that the said *Nicolo Garamone* did, at *Corfu* aforesaid, by one *Antonio Capello*, his advocate in that behalf, present to the civil tribunal of the first instance there sitting a petition in writing, whereby the said *Nicolo Garamone* prayed that a certain other petition, before then presented to the said tribunal by the said *Marianna Crissaffi*, his wife, and praying for alimony to be by the said *Nicolo Garamone* paid to the said *Marianna* his wife, should be rejected as unfounded and untenable, on divers grounds therein enumerated, and,

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amongst other things, the said *Nicolo Garamons* did, in and by his said petition, allege that the said *Marianna* had been unfaithful to her conjugal duty by reason of the said crime of adultery so committed by the said *G. G. Achilli* as aforesaid, and did therein and thereby propose to prove the same by sufficient and lawful witnesses in that behalf." (23.) "That, before the composing" &c., "to wit on the 1st day of January A.D. 1850, and on divers other days and times, to wit at *Westminster*" &c., "he, the said *G. G. A.*, although knowing himself to have been guilty of the several offences aforesaid, did deny them and all of them, and declare that he was not guilty thereof, and that he, the said *G. G. A.*, at the said times when he committed the said several offences as aforesaid, and thereby was in fact ravening after sin, did profess and pretend to be seeking after truth; and that, by reason of the said several offences so committed by him as aforesaid, he, the said *G. G. A.*, was and is a proof that priests may fall and friars break their vows; and that, by reason and in consequence of his said offences, he, the said *G. G. A.*, was and is unfit and unworthy to be believed and credited in respect of the charges and allegations by him made against the doctrines and discipline of the Church of *Rome*, and the persons professing or adhering to the same, to wit at *Westminster*" &c. "And so the said *J. H. N.* says that the said alleged libel consists of allegations true in substance and in fact, and of fair, just and reasonable comments thereon. And the said *J. H. N.* further says that, at the said time of the said composing" &c., "to wit at *Westminster*" &c., "it was for the public benefit that the matters in the said alleged libel contained, and therein charged against the said *G. G. A.*, should be published: because he says" &c. The plea then alleged, in substance, that public discussions had been held in *England* on matters of controversy between the churches of *England* and *Rome*, "with respect to which it was of public importance, and for the public benefit, that the truth should be known:" and, inasmuch as *G. G. A.* took a prominent part in these discussions, and his opinion and testimony was by many appealed to and relied on as those of a person of character and respectability, it was necessary, for the purposes of more effectually examining and ascertaining the truth, that the matters contained in the alleged libel should be known in order that it might appear that his opinion and testimony were not deserving of credit, by reason of his misconduct in respect of the matters charged against him. That he had endeavoured, by public teaching, to excite bad feeling against the persons professing the Roman Catholic religion; and it became important and conducive to diminishing such bad feeling that the matters charged should be known. That he had represented, both in public and private, that he was innocent of the crimes and misconduct so committed by him, and was injured by the foreign ecclesiastical authorities in respect to those matters, and had been persecuted by the Roman Catholic Church, and was a martyr, on account of his religious opinions; and that he was endeavouring, and was likely, to obtain credit and assistance from

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Her Majesty's subjects by reason of their being ignorant of his misconduct : and it was of public importance and for the public benefit that his misconduct should be known. " And so the said *J. H. N.* says that he composed and published the said alleged libel, as in the said information mentioned, as he lawfully" &c. Verification.

Replication. That the said *J. H. N.*, of his own wrong, and without the cause in the said second plea alleged, composed &c. Conclusion to the country.

Issue thereon.

On the trial, before Lord *Campbell* C. J., at the *Middlesex* sittings after last *Trinity* term, the publication of the libel was proved on the part of the prosecution. On the part of the defendant no evidence was offered on the first issue : but evidence was offered in support of several of the imputations (including that marked 19), contained in the second plea : but as to some of the imputations (more particularly specified in the judgment of the Court) no evidence was offered for the defence. In reply, evidence was given in answer to some of the imputations; and Dr. *Achilli*, who was examined, denied the truth of each, as far as the facts were within his knowledge (a). It was admitted that, if the imputations were true, the publication was for the public benefit. The jury found that the charge numbered 19 was proved, but that no other charge was proved. The Lord Chief Justice then directed a verdict to be entered generally for the Crown on both issues, adding that he should report the finding of the jury to the Court.

In last *Michaelmas* term, Sir *A. J. E. Cockburn* obtained a rule *Nisi* for a new trial, on the ground (b)

(a) He stated that the judgment of the Inquisition, of which evidence was given at the trial, had never been communicated to him.

(b) For a point as to which the rule was refused, see *Regina v. Newman*, ante, p. 268.

that the verdict was against the weight of evidence. In this term (a),

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Sir *F. Theigier*, Sir *F. Kelly* and *T. F. Ellis* shewed cause. It is not suggested that there was evidence upon which the jury could have found that all the charges were proved; the justification therefore fails; and the verdict must stand for the Crown, as it must have done even had the jury found in the defendant's favour as to all the charges on which evidence was offered for the defence. There can be a new trial only where ground is shewn for believing that the issue ought to have been otherwise found. The Court may in the present case examine the evidence in order "to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same;" stat. 6 & 7 *Vict. c. 96. s. 6.*; but the finding of the jury is immaterial for this. If no evidence had been offered in reply, the prosecutor might have claimed the verdict, admitting the truth of the imputations as to which evidence was offered: and then the only question for the Court would have been, how far the guilt of publishing charges which could not be supported was mitigated by the defendant having published other charges which were true. But, further, the findings were right, upon the evidence. (The argument as to this is omitted.)

Sir *A. J. E. Cockburn*, Attorney General, *Wilkins* Serjeant, *Bramwell*, *Joseph Addison* and *Badeley*, contra. If the argument on the other side be correct,

(a) The case was argued on January 20th, 21st and 22nd. Before Lord Campbell C. J., Coleridge, Wightman and Erle Js.

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the prosecutor was bound to take the course supposed: he should have claimed the verdict without going to the jury. He cannot be permitted to ask the jury for a verdict, and then insist on retaining it, whether right or wrong, on the ground that it is immaterial what the findings are. The plea and the issue should be taken distributively: the defendant is entitled to have the parts which are found for him entered on the *postea*; and, that being so, he is entitled to a new trial if any of the findings cannot be supported. The least that can be said of the verdict is that it will to some extent assist the discretion of the Court in apportioning the punishment. If so, and the verdict is erroneous, it ought not to stand. (The argument as to the weight of evidence is omitted.)

Cur. adv. vult.

Lord CAMPBELL C. J. now delivered the judgment of the Court.

We are of opinion that in this case the rule for a new trial ought to be discharged. The defendant has pleaded two pleas to the information: and we think that on both pleas the verdict must stand for the prosecutor.

The defendant having admitted the publication of the libel, and that it contains defamatory charges against the prosecutor, there is no defence under the plea of Not guilty.

The application to the Court rests upon the finding of the jury respecting the 2nd plea, which alleges the truth of the matters charged in the libel against the prosecutor, and that it was for the public benefit that the said matters charged should be published. This plea is framed upon the recent statute, 6 & 7 *Vict. c. 96*.

s. 6. Before that enactment, the truth of the charges contained in a libel was no defence to an indictment or criminal information for publishing it. The truth could not be given in evidence under a plea of Not guilty; and no special justification on the ground of truth could be pleaded. It was even said that "the greater the truth the greater the libel." The Legislature, thinking that such a maxim misapplied brought discredit on the administration of justice, and that, under certain guards and modifications, the truth of the charges might advantageously be inquired into, and might be permitted to constitute a complete defence, passed the statute referred to. But this statute provides that, "to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged," "and further to allege that it was for the public benefit that the said matters charged should be published;" "to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof." Thus it is quite clear that, when the prosecutor has replied, to such a plea, that the defendant wrongfully published the libel without the cause alleged, and issue has been joined upon this replication, the prosecutor is entitled to a verdict unless the defendant proves, to the satisfaction of the jury, the truth of all the material allegations in the plea. The only function allotted to the jury is to say whether the whole plea is proved or not. If they find that it is, the defendant is acquitted. If they think that it is not, they are to declare that the defendant wrongfully published the libel without the cause alleged; and he is convicted. The jury are

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then *functi officio*; and the Legislature did not contemplate that any question would be put to them as to how much of the plea was proved, if the whole was not proved; for, without proof of the whole, a conviction must take place, to be followed by a sentence. Nevertheless, the Legislature wisely thought that, although under such circumstances sentence must be passed, the just measure of punishment may materially depend upon the unsuccessful plea of justification and the evidence given under it. In some cases, the defendant may maliciously plead such a plea, when he has no substantial evidence to support it; or he may try to support it by false evidence. On the other hand, he may have had reasonable ground for believing that he could prove the whole of it; and he may have adduced sincere witnesses to substantiate a part of it, while without default of his own a material part of it is not substantiated by legal proof. Where there has been a conviction after a plea of justification, what course is to be followed, so that justice may be done, and a due measure of punishment meted out according to the real guilt of the defendant? It is quite clear that the Legislature refers every thing to the Court alone after the finding of the jury upon the question, whether the whole plea is proved; for it has enacted "that if after such plea the defendant shall be convicted on such indictment or information it shall be competent to the Court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same."

Such being the existing law upon the subject, let us apply it to the present case. The defendant's plea of justification complies fully with the conditions of the

statute; for it alleges the truth of all the criminatory matters charged in the libel (amounting to twenty three distinct charges), and further alleges that it was for the public benefit that all the said matters charged should be published. The prosecutor replied, denying the whole of the plea; and thereupon a single issue was joined. After much evidence had been given on both sides, the jury expressed an opinion that only one of the charges mentioned in the plea was proved to their satisfaction; and, as to the issue joined on this plea, the verdict was accordingly entered for the prosecutor.

The counsel for the defendant, in arguing the rule for a new trial, hardly found any fault with the opinion expressed by the jury as to a considerable number of the charges mentioned in the plea, several of these being of a very grave nature: such as the 7th, that the prosecutor did at *Viterbo* "debauch, seduce and carnally know" "*Rosa de Alessandris*, then being chaste and unmarried," "and then and there" "robbed her of her honour;" and that he "was found guilty of having so debauched, seduced and carnally known" her, and robbed her of her honour, before Bishop *Pianetti*, the Bishop of *Viterbo*. So the 8th charge, that the prosecutor "did debauch, seduce and carnally know a certain other woman, then being chaste and unmarried," whose name the defendant was unable to ascertain; and that he also robbed this woman of her honour. So the 9th charge, that the prosecutor, "at *Monte Fiasconi* and elsewhere in the neighbourhood of that place," did "commit sins similar to, or worse than, the said sins and offences hereinbefore mentioned." So the 10th charge, that the prosecutor, "being then a Friar and member of the order of *St. Dominic*," "at *Capua*," "did debauch, seduce and

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carnally know a certain other woman then being chaste and unmarried," whose name is unknown to the defendant, and robbed her of her honour. So also in the 15th charge, that the prosecutor had been dismissed from the college at *Malta* (among other things) for offences which the authorities were "unwilling to state or describe, and which they have hitherto forborne to state or describe, and cannot get themselves to describe specifically." So the 20th charge, that, after the prosecutor had so debauched and carnally known and robbed of her honour the said *Rosa de Alessandris*, he "was obliged to give a large sum of money" "to the father of the said last mentioned young woman as hush money, and by way of compensation for the injury, damage and loss of services to the said father," and that, by the reports and documents of the police at *Viterbo*, it was declared that the prosecutor "had so given the said money as such hush money." So the 21st charge, "that in and by a certain official document or report of the officers of police at *Naples* in *Italy*, and being amongst the archives and documents of the said *Neapolitan* police," the prosecutor "was reported and declared to be known for habitual incontinency."

In support of some of these charges no evidence whatever was offered; and the jury were clearly justified in finding that they were not established. There is no affidavit or suggestion that any further evidence could be given in support of them; and it is admitted that, if a new trial were granted, the verdict of the jury must still be that the defendant published the libel without the cause alleged by him in his plea of justification: so that, being again convicted, he must again be brought up to receive the sentence of the Court.

The defendant's counsel confine their complaint of

the opinion expressed by the jury to some of the charges against the prosecutor. These are certainly of a very heinous character: particularly the 6th, for the seduction of *Elena Valente* at *Viterbo*; the 11th, for the seduction of *Maria Principe* at *Naples*; the 14th, for adultery with the wife of *Garamone*, and the wife of *Coriboni* at *Corfu*; and the 16th charge, for illicit intercourse with *Harriett Harris*, *Jane Legg*, *Surah Wood* and *Catherine Gorman* in *England*. It has been very powerfully argued that, with respect to all these cases, the jury were wrong in saying that the charges were not proved, and that another jury would come to a different conclusion.

Even if we should be of opinion that, with respect to any one or to all of these charges, the evidence greatly preponderated against the prosecutor, we conceive that we could not with propriety set the verdict aside and grant a new trial. The only argument used at the bar which would lead to a different conclusion was, that the plea may be considered *distributive*, and that the jury were entitled to find a verdict to be entered on the record for the defendant on any part of the libel, covered by a corresponding part of the justification, which they find to be proved. But this argument proceeds on a fallacious assumption. It has uniformly been held that, even in a civil action for a libel, the plea of justification is one and entire. It raises only one issue; and, unless the whole plea is proved, that issue must be found for the plaintiff. Some difference of opinion has prevailed as to how far a partial proof of the justification ought to operate in reduction of damages: but all authorities agree that there can be no partial finding for the defendant on the ground that the justification is partially established. In a criminal prosecution for a libel, had

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liberty been given by the Legislature to plead the truth as a defence, without any special direction as to the proceedings in case the whole plea is not proved, the jury could have had no right to find that a part of the justification is proved; for there are no damages to be assessed, and the sentence to be pronounced rests exclusively with the Court. But all doubt upon the subject is removed by the express enactment that, wherever there is a conviction after a plea of justification, "the Court, in pronouncing sentence," shall "consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same." The Court is to consider the evidence on the one side and on the other, and to form their own conclusion whether it aggravates or mitigates the guilt of the defendant. By that conclusion the sentence is to be regulated, and not by any declaration of the jury as to the credit which they think ought to be given to the witnesses examined. It is quite clear that the opinion expressed by the jury on any particular parts of the plea (the whole not being proved) could not be entered on the record. It might be reported by the Judge, who presides at the trial, to the Court by whom the sentence is to be pronounced: but still the Judges, in deliberating upon the sentence, are bound to form their own opinion upon the evidence: and, as they think that it aggravates or mitigates the guilt of the defendant, they are to apportion the punishment accordingly. The evidence, as it appears on the notes of the Judge who presided at the trial, comes in place of the production of affidavits in aggravation or mitigation of punishment when sentence is to be pronounced. It may often be more satisfactory than such

affidavits; as the witnesses by whom it was given were examined *vivâ voce* and were subject to cross examination.

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Under these circumstances, how can we set aside the verdict and grant a new trial? This course is to be adopted only where some issue has been improperly found, and a different verdict may be expected. But here it is admitted that the issue has been properly found, and that the jury must again find that the defendant wrongfully published the libel without the cause or justification which he has alleged in his plea. Again the defendant must come before us for sentence; and the evidence to be considered by us in measuring out the punishment would (as far as we know) be in no respect different from that given upon the trial which has already taken place.

For these reasons, a new trial must be refused and sentence must be pronounced. But, pronouncing sentence, we shall, in the discharge of our sacred duty, consider whether the guilt of the defendant is aggravated or mitigated by the plea and the evidence given to prove and to disprove it. In this manner we conceive that the intentions of the Legislature will be strictly fulfilled, and the ends of justice will be fully answered.

Rule discharged.

On a subsequent day in this term (*January 31st*), the defendant was brought up for judgment. He produced affidavits in mitigation of punishment: among others, one by himself, in which he deposed that he, before and at the time of the publication, and at the time of pleading, believed in the truth of the charges against *Achilli* contained in the libel and plea. He also deposed that,

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after the publication of the libel, and before the pleading of the pleas, he received from *Viterbo* in *Italy* an affidavit, made by *Rosa de Alessandris* (the person named in the part of the second plea relating to the 7th, 13th and 20th charges), to the effect that she had been seduced by *Achilli*, when she was of the age of sixteen, and that he had, before and at the time of the seduction, attempted to weaken her religious belief as to the sin of fornication, and as to the future punishment of such sin.

No evidence in support of this part of the plea had been offered at the trial; but the defendant then produced evidence with a view to account for the absence of *Rosa de Alessandris*, on the ground of sickness. *Achilli*, in his evidence in reply, at the trial, swore that he had never been acquainted with or heard of any person of the name, except a lady, his relation, some years older than himself, and then a nun in a convent in *Italy*; whose father had died when he, *Achilli*, was five or six years old: and he swore that he had never had any criminal intercourse with this lady. The cross examination at the trial, as to this part, was directed to eliciting from him that he was acquainted with another person of the same name: but he persisted in denying this.

The Counsel for the Crown objected to the reading of this part of the affidavit. It is now attempted to bring before the Court, by the defendant's oath as to what he has been told, evidence of a fact which was in issue at the trial, and which evidence was not produced or producible at the trial.

The Counsel for the defendant. The object is not to support any part of the issue: for the present purpose, it might be assumed that the imputation in the plea was

untrue. The object is to shew that, true or not, the defendant had reason to believe in the truth. [*Coleridge* J. He gives as a reason for his belief matter which came to his knowledge after the publication of the libel.] The evidence is addressed to that provision in the statute which enables the Court to take into consideration whether the plea of justification, and the evidence in support of it, aggravates or mitigates the guilt. The evidence shews that the defendant had reasonable cause for his plea.

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ERLE J. This evidence appears to me admissible, on that ground. In a civil action for libel, a plea of justification affords a ground for enhancing the damages. So here the plea, if pleaded without reasonable ground, would have the effect of aggravation: and the evidence is directed to shewing that it is not so pleaded.

WIGHTMAN J. The libel itself contained no names: the defendant was compelled to insert names, as far as he could: and the evidence shews why he inserted this particular name.

COLERIDGE J. I quite agree as to the principle. My only doubt is, whether the facts are within the principle.

Lord CAMPBELL C. J. This part of the affidavit is clearly admissible, under the statute, to shew why this part of the plea was placed on the record; the fact of the plea being one to be considered by the Court in apportioning the punishment.

The affidavit was then read.

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An affidavit was then offered in mitigation, made by a person who had been employed to collect evidence in *Italy*. He deposed (with respect to the part of the plea relating to the 21st charge) that he had seen, at the Office of Ecclesiastical Affairs for the kingdom of the *Two Sicilies*, a document of which he had taken an examined copy, and which copy was annexed to his affidavit. The document purported to contain proceedings before the *Neapolitan* police, to the effect stated in the part of the plea in question. This affidavit did not state that the document had been communicated to the defendant: but, from the defendant's affidavit, it appeared that this had been done before plea pleaded.

This copy had been offered in evidence on the trial, but had been rejected, because it was not shewn by the place of custody, or otherwise except from its contents, to be connected in fact with the proceedings of the police.

The Counsel for the Crown objected to the reception of this affidavit, on the ground that it brought before the Court matter which had been already held inadmissible; and that, as to the defendant's belief, it was superfluous, inasmuch as he had already deposed to his belief, and to his having received the document.

The Counsel for the defendant. The affidavit is admissible as confirming the defendant's assertion of his belief.

PER CURIAM. We think this document inadmissible.

The Counsel on each side having addressed the Court, the defendant was sentenced to pay a fine of 100*l.*, and to be imprisoned among the misdemeanants in the first class in the Queen's Prison till the fine should be paid.

1853.

The Overseers of the Poor of the Parish of
 HESTON, Appellants, *against* The Overseers of
 the Poor of the Parish of SAINT BRIDE,
 Respondents.

*Wednesday,
 January 26th.*

THE overseers of *Heston* having given notice of their intention to appeal against the after mentioned order of 9th *October* 1852, a special case was stated for the opinion of this Court, by order of *Coleridge J.*, under stat. 12 & 13 *Vict. c. 45. s. 11.* The case, in substance, stated the following facts.

By order of 7th *February* 1852, under the hands and seals of two justices of *London*, the place of the last legal settlement of *Harriet Tanner* and her five lawful children was adjudged to be in the parish of *Heston*, in *Middlesex*; and they were ordered to be removed to that parish from the parish of *Saint Bride*, in the City of *London*. The statement of the grounds of removal set forth that *Harriet Tanner* was married in *May*, 1836, to *William Tanner*, confined, at the time of the order, in *Camberwell House Lunatic Asylum, Camberwell, Surrey*; by which marriage she had the five children. And that *William Tanner*, and also his father *John Tanner*, were born in *Heston*. The parish of *Heston* appealed against this order, one ground of appeal being a settlement of *William Tanner*, gained by hiring and service in the parish of *Isleworth, Middlesex*, the hiring being in 1822. On the trial of the appeal, at the session holden in *April* 1852, the marriage and the last mentioned settle-

On appeal against an order of maintenance of a lunatic pauper, under stat. 8 & 9 *Vict. c. 126. s. 62.*, upon an adjudication of settlement under sect. 58.: a prior order of sessions adjudicating on the settlement, upon an appeal, between the same parties, against an ordinary order of removal, is conclusive as to the settlement at the time of such prior order: there being no difference, as to this rule of evidence, between orders of maintenance of lunatics on adjudication of the settlement and ordinary orders of removal.

1853. ment were both proved; and the Sessions quashed the order of removal.

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By order of 1st *May* 1852, under the hands and seals of two justices of the City of *London*, the last legal settlement of *William Tanner*, the lunatic, was adjudged to be in *Isleworth*; and the churchwardens and overseers of that parish were ordered thereby to pay certain moneys for the past and future maintenance of him as a pauper lunatic. A duplicate of this order was served on the parish officers of *Isleworth*, with a notice of the particulars of settlement, wherein the above mentioned settlement by hiring and service was insisted upon. *Isleworth* appealed against this order, and served grounds of appeal; one ground being a subsequent settlement of *William Tanner* in *Heston*, by hiring and service, the hiring being in *May* 1831. On the trial of this appeal at the session holden in *September* 1852, the case of the respondents was admitted: but the appellants proved the subsequent settlement; and the Sessions quashed the order.

By order of 9th *October* 1852, obtained by the parish officers of *Saint Bride*, it was adjudged that the last place of legal settlement of *William Tanner*, then confined as a lunatic in the asylum, was in *Heston*; and the parish officers of that parish were thereby ordered to pay for the maintenance. In the grounds of removal, the settlement last mentioned, by hiring in *May* 1831, and service thereunder, was insisted upon. This order was the subject of the present case; which concluded as follows.

“The question for the opinion of the Court is, Whether, upon the facts above stated, the order for the removal” &c. (of 7th *February* 1852), “which was

quashed on appeal as aforesaid, is to be taken as conclusive between the said parish of *Heston* and the said parish of *Saint Bride*, by way of estoppel, as to the settlement of the said *William Tanner* not being in the said parish of *Heston* on the day of the date of the said last mentioned order; and, therefore, whether the parish of *Saint Bride* is estopped from making the said order of the 9th of *October*. If the Court shall decide this question in the affirmative, the order bearing date the said 9th day of *October* is to be quashed: if otherwise, the said last mentioned order is to be confirmed.

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Huddleston, for the respondents. The quashing of the order of 7th *February* 1852 was not conclusive. It must perhaps be taken that the Sessions adjudicated on the settlement of *William Tanner*, though that is not expressly stated. But a later settlement than that adjudicated upon is shewn. In *Regina v. Wye (a)* an order was held not conclusive which was founded on a marriage afterwards set aside. [*Coleridge J.* The order was there left untouched; a new state of facts had arisen.] Undoubtedly the general rule, in the case of orders of removal, is that an order confirmed or quashed on appeal is conclusive between the same parties as to the state of facts then existing: and, had the order of 9th *October* 1852 been an ordinary order of removal, the respondents would have been bound as to the settlement first adjudicated upon. The former order may, however, be explained; *Regina v. St. Peter's, Droitwich (b)*. Further, this order is made under the Lunatic Act, 8 & 9 *Vict. c. 126. ss. 58., 62. Sect. 58*

(a) 7 *A. & E.* 761.(b) 9 *Q. B.* 886.

1853. authorizes the justices to inquire into and adjudicate on the settlement "at any time."
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Bride's. *Clarkson*, contra, relied upon the concluding words of sect. 62. He was stopped by the Court.

Lord CAMPBELL C. J. I am clearly of opinion that the quashing of the order of 7th *February* 1852 is conclusive. Such quashing is generally conclusive between the same parties, with this qualification, that, if there be additional evidence of any thing subsequent to the order, the estoppel is confined to the state of things existing at the time of the order. The law is well laid down in *Rex v. Wick St. Laurence* (a). Now apply that here. The point respecting the settlement of the husband was adjudicated, between the same parties, on 7th *February* 1852, before a competent tribunal, which determined that the husband was not then settled in *Heston*. That will not prevent the parish of Saint *Bride* from shewing a settlement acquired subsequently to that adjudication: but, as to the settlement at that time, it is conclusive. Mr. *Huddleston* admits that this would be so if the question arose on an ordinary order of removal; but he contends that an order of maintenance, under stat. 8 & 9 *Vict. c.* 126. ss. 58., 62., is distinguishable. But the same question of evidence arises in each case. The question as to the propriety of the adjudication here is determined by the settlement of the husband; and that is conclusively shewn not to have been in *Heston* on the 7th *February* 1852; and no later settlement is set up.

(a) 5 B. & Ad. 526.

COLERIDGE J. I am of the same opinion. The first point is really quite elementary; and the principle is not confined to orders of removal; it pervades the whole law. The decision of a competent tribunal is conclusive as to the same point between the same parties: it is not open to either to say that the decision was wrong at the time when it was given. But then Mr. *Huddleston* distinguishes the case of an order for the maintenance of a lunatic, and says that, by applying the principle here, we give no effect to the words "at any time to inquire," in sect. 58 of stat. 8 & 9 *Vict. c. 126*. But, on looking at sect. 57, you see why these words are introduced. The pauper lunatic is "deemed to belong to and continue chargeable to the parish from which" "he shall have been sent, until such parish shall in due course of law, as in the case of any other pauper, have established that such lunatic is settled in some other parish, or that it cannot be ascertained in what parish such lunatic is settled." The Legislature contemplated that no evidence might be attainable at first, and therefore gave an indefinite time for inquiry, during which the truth might be discovered. But then the inquiry is to be conducted on the same principles as the inquiry into the settlement of any other pauper. *Regina v. St. Peter's, Droitwich (a)*, is not inconsistent with this view. We had there quashed an order, not on the ground of settlement, but on the ground that payment had been made to the wrong person: and it is so stated in our judgment. Then a fresh order was obtained; and evidence was given of the grounds of our judgment, shewing it to be not conclusive. This was quite right: any thing that may have been said beyond that was extrajudicial.

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WIGHTMAN J. Mr. *Huddleston's* distinction between this case and ordinary orders of removal (as to which the law is settled in *Rex v. Wick St. Laurence* (a)) fails. The words "at any time," in sect. 58, relate merely to the time at which the inquiry may take place. But what is conclusive evidence at one time is so at another.

CROMPTON J. concurred.

Judgment for appellants.

(a) 5 B. & Ad. 526.

Thursday,
January 27th.

THE "Directions to the Masters of the Courts" are dated of this day (a).

(a) See post, Appendix, III., p. lxxv.

Thursday,
January 27th.

The QUEEN *against* the Mayor, Aldermen
and Citizens of YORK.

The justices
of the borough
of Y. appointed
R. keeper of
the gaol in that
borough, at a
salary of 120*l.*
a year, and
made an order

BLISS, in this term, obtained a rule Nisi for a mandamus commanding the Mayor, Aldermen and Citizens of *York* to confirm an order, of 25th *October* 1852, made by the justices of the City in Gaol Sessions

on the treasurer of the borough to pay him his salary. The town council refused to confirm this order, on the ground that they considered the salary excessive. On a rule for a mandamus commanding them to confirm the order :

Held : that the duty of the council, under stat. 7 W. 4 & 1 Vict. c. 78. s. 38., was not merely ministerial, to confirm such orders as were made by the justices ; but that they had a discretion, to approve or disapprove of the order sent to them : and the rule for a mandamus was discharged.

assembled, for the payment to *John Raper*, the Governor and Keeper of the House of Correction in that City, of 30*l.*, for one quarter's salary.

From the affidavits it appeared that in *April*, 1852, there was a vacancy in the office of Governor and Keeper of the House of Correction in the City of *York*. The town council wished the salary of the new governor to be fixed at 90*l.* The justices at a Gaol Sessions, on 12th *April* 1852, resolved that the salary should be 120*l.* per annum: and, at a subsequent meeting, they elected *John Raper* to be the Governor and Keeper of the House of Correction at the salary of 120*l.* a year, payable quarterly, from the 1st *June* 1852. *Raper* accordingly entered into the office on 1st *June*. No objection was made to him personally, or to his appointment; but the town council still objected to the amount of the salary. The justices made the following order "To the Treasurer of the City of *York*. We, the undersigned, Her Majesty's Justices of the Peace, acting in and for the said City of *York* at the *Michaelmas* Gaol Sessions for the said City, held by adjournment this 25th day of *October* A. D. 1852, do hereby order and direct you, the said Treasurer, to pay to Mr. *John Raper*, the Governor and Keeper of the House of Correction of the said City, out of the rate applicable thereto, the sum of 30*l.*, being one quarter's salary due to him as such Governor and Keeper on the 1st day of *September* last. Given under our hands and seals" &c. This order was sent for confirmation to the town council. Several meetings took place between the justices and a committee of the town council: but the justices would not agree to make an order for 22*l.* 10*s.* (being the quarter's salary at the rate of 90*l.* per annum); nor would the town council confirm

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the order for 30*l.* (being the quarter's salary at the rate of 120*l.* per annum). Both parties requested the Court to decide the question on the motion.

Cowling now shewed cause. The question depends upon the construction to be put on stat. 7 *W.* 4 & 1 *Vict.* c. 78. s. 38. Before that act, stat. 4 *G.* 4. c. 64. gave the justices the complete controul of the gaols. Sect. 25 gave them power to appoint all the gaol officers; and sect. 26 authorized them to fix the salaries of the officers, which were to be paid out of the rates lawfully applicable thereto. By sect. 2, that act is made applicable to the towns named in the Schedule (A) to that Act; amongst which towns is *York*. Then the Municipal Corporation Act, 5 & 6 *W.* 4. c. 76. s. 116., gave the council of every borough named in that Schedule all the powers given to the justices by stat. 4 *G.* 4. c. 64. On the passing of that Act, the council had the controul of the gaol, appointing the gaol officers, and fixing their salaries. This was again altered by stat. 7 *W.* 4 & 1 *Vict.* c. 78. By sect. 37 all the powers for building, enlarging and repairing gaols, which, before stat. 5 & 6 *W.* 4. c. 76., the justices in sessions had, are (subject to the alterations made by stat. 5 & 6 *W.* 4. c. 38.) to be exercised at some quarterly meeting of the council. This enactment is subject to two provisos: first, that, before building or enlarging a gaol, the expediency thereof shall be certified under the hand of the Recorder: second, that all rules for the government of prisoners shall be approved by two or more justices acting in and for the Borough. Sect. 38 enacts "that all the powers of regulation which before the passing of the said Act for regulating Corporations were

possessed by the justices having the government or ordering of any such gaol or house of correction, and all things by any Act of Parliament provided to be done at any general or quarter sessions of the peace, in relation to the regulating of any such gaol or house of correction, shall, subject to any such alteration as aforesaid, be exercised or done by the justices of the city or borough to which such a gaol or house of correction shall belong, and for that purpose the justices shall hold a quarterly session at the usual times of holding quarterly sessions of the peace; provided that no order made by the justices in pursuance of these powers which shall require the expenditure or payment of any money shall be of force until confirmed by the council of that city or borough."

The intention of the Legislature is clear. The council are the representatives of the ratepayers; but they are not the administrators of the law. The justices are those who have the administration of the law; but they are not so intimately connected with those who furnish the funds. Therefore, the Legislature gave to the council the controul of the expenditure of money, and to the justices the controul of the gaol, so far as connected with the administration of the law. But, as in some cases the expenditure of money is connected with the administration of the law, the Legislature, in such cases, required the concurrence of both. The justices are to make orders in pursuance of their powers for regulating the gaol; and the appointment of a gaoler and the fixing of his salary are such orders; *Regina v. Lancaster(a)*: but, by the proviso, no order which shall require the payment of money is to be of force "until confirmed by

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(a) 10 Q. B. 962.

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the council." The council are a deliberative body, and, under sect. 37, are entrusted with great discretionary powers over the expenditure of the borough funds on gaols: the Legislature cannot have intended that, under this proviso, they should act as mere registrars of the orders of justices. The proviso is, not that all orders shall be confirmed by them, but only those orders which require the payment of money. The object of this must be, that they may exercise a deliberative discretion as to whether the expenditure is proper: and this discretion must have been entrusted to them for the purpose of protecting the public purse. If they were, under colour of this discretion, to abuse their powers for the purpose of usurping the patronage, no doubt this Court would interfere. But here there is a *bonâ fide* objection to the amount of the salary; and, unless the Legislature had meant them to exercise some controul over that amount, the justices would have been empowered to order the payment absolutely.

Bliss, *contra*. The construction of the proviso in sect. 38, which is contended for by the other side, would in effect render nugatory the enactment. If the council have an absolute and unlimited right to refuse to confirm an order for the payment of the salary, because they do not approve of the amount, they are really the persons who have power to fix it, not the justices. But the justices have that power; *Hammond v. Peacock* (a), *Regina v. Lancaster* (b). [Lord Campbell C. J. The justices are to fix the salary. It is one of the powers restored to them. But the Legis-

(a) 1 *Esch.* 41.

(b) 10 Q. B. 962.

lature might think it fit to restore that power to the justices, sub modo, so that, though they initiate and propose, a controul is reserved to the council.] The practical effect would be that they would have the entire patronage: for, unless the justices make such orders as the council approve of, the whole administration of the gaols would be stopped. But the true construction is, that the act of the council is ministerial. They can no more refuse to confirm a proper order for the gaolers' salary than they could refuse to pay the salary of the Recorder and others, fixed by stat. 5 & 6 *W. 4. c. 76. s. 92.*, or the expenses of prosecutions. The confirmation by the council is like the allowance of a poor rate by two justices under stat. 43 *Eliz. c. 2. s. 1.* The words are there "by and with the consent of two or more such justices of peace:" but it is well settled that the justices have no discretion to refuse their consent.

Lord CAMPBELL C. J. Mr. *Bliss* has argued with much ingenuity, but without being able to raise any doubt on the question, which depends entirely on the construction of stat. 7 *W. 4 & 1 Vict. c. 78. s. 38.* It seems to me clear that this order was one within the powers restored to the justices by the enacting part of that section. But the question is, whether the intention of the Legislature was that those powers should be restored absolutely, or only sub modo, subject to a controul on the part of the council, where their exercise necessitates the payment of money. There is nothing absurd or unreasonable in such an intention: and the question is, whether the proviso expresses it. It really

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all comes to this: what does the word confirm, as used in this proviso, mean? That word sometimes means merely "verify:" it is commonly used in that sense at the meetings of public bodies, who confirm the minutes of their last meeting, not meaning thereby that they give them force, but merely that they declare them accurate. The word may be used in that sense in other Acts. But, in this Act, the word seems to me to be used in the sense of "approve." I think that the object of the proviso was, not that the council should register what the justices had done, but that they should exercise a deliberative discretion on the subject. If the council were to refuse to exercise a discretion on the subject, or to pretend colourably to exercise one, a mandamus would lie; but that is not the present case. They do here exercise a discretion; they come to the conclusion that the salary which the justices have ordered to be paid is excessive; and, if they are of that opinion, they are not bound to confirm the order. I have no fear that this construction will cause the course of justice to be impeded in *York*. We must suppose that the council will properly exercise the powers committed to them by the Legislature. It is not a proper argument, to reason against the use of a power because of the possibility of its abuse. In all corporate bodies powers must be entrusted to a governing body; and sometimes, as in the cases of the two Houses of Parliament, to two bodies who must concur in exercising these powers. I think it no unreasonable scheme, to confer on the justices the power to appoint the gaoler, and propose his salary, and refer it to the council to approve or disapprove of the salary proposed. The Legislature might well trust

that, if the justices and council differed, they would meet and confer, and settle their disputes by mutual concession.

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COLERIDGE J. The construction suggested by Mr. *Cowling* results from the natural and grammatical meaning of the language employed; and it is a reasonable meaning. Powers are conferred on the justices, some of which require the expenditure of the money of the rate payers. The council have the general controul of the expenditure given to them, as they are supposed to represent the body of rate payers. Is it not then a reasonable enactment, that the justices shall not have power to order the expenditure of this money, unless their orders are confirmed by the council? Mr. *Bliss* contends that the intention was that such an order, when made, must be confirmed as a matter of course; and, if he is right, the wording of the proviso ought to have been "provided that *every* order made by the justices in pursuance of these powers which shall require the expenditure or payment of any money *shall* be confirmed by the council." It may be observed that in stat. 5 & 6 W. 4. c. 76. s. 114. the Legislature, when dealing with the costs of prosecutions, where the amount is ascertained and the council have no discretion, does use language of this kind: the council "shall forthwith order the same" to be paid out of the Borough fund. But, in this proviso, the language is such as *primâ facie* means that the council shall exercise a discretionary power. No inconvenience is likely to arise from their having such a power; and to suggest a possible abuse of a power is no argument against its existence.

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WIGHTMAN J. Stat. 5 & 6 W. 4. c. 76. s. 116. transferred to the council all the powers exercised by the justices under the general gaol Acts; and, if no change had been made in that enactment, the gaoler would have been appointed, and his salary fixed by the council. But stat. 7 W. 4 & 1 Vict. c. 78. s. 38. takes those powers from the council to some extent, and restores them to the justices. And the question is, how far the exercise of those powers is controlled by this proviso "that no order made by the justices in pursuance of these powers which shall require the expenditure or payment of any money shall be of force until confirmed by the council of that city or borough." The present order is one requiring the payment of money; and, as far as regards that kind of order, the object of the Legislature was not to take away all controul from the council; for the order is not to be of force till confirmed by the council. "Confirmed" is a word, the natural meaning of which is more than "indorsed" or "verified." It is equivalent to "approved:" and it is here to be construed in its natural sense, unless some manifest inconvenience is likely to arise from doing so. No such inconvenience seems likely. The proviso may probably in some cases give a salutary controul over the expenditure, exercised by the body who know most about the state of the borough finances (a).

Rule discharged.

(a) Crompton J. was absent on account of a domestic calamity.

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The QUEEN *against* ARCHIBALD WILSON.*Thursday,*
January 27th.

SIR F. Thesiger, in this term, obtained a rule calling on the prosecutors to shew cause why a side bar rule, obtained in this prosecution, for taxing the costs to be paid by the defendant to the prosecutor or his attorney, should not be set aside. From the affidavits, on both sides, it appeared that the defendant was, in 1851, committed by the then Lord Mayor, to take his trial for an indecent assault on a boy. An indictment was preferred at the Central Criminal Court, and was removed by certiorari into this Court at the instance of the defendant. The case was tried before a special jury; and the defendant was convicted. In criminal cases, within the City, in which a failure of justice is likely to ensue if the prosecution is left to the person injured, the Lord Mayor or Alderman, who commits the prisoner, usually instructs the city solicitor to conduct the prosecution; and the costs of all prosecutions thus conducted are, in practice, allowed out of the City funds. In the present case, the defendant being a person of considerable wealth, and the person assaulted a boy in humble circumstances, the Lord Mayor instructed the city solicitor to conduct the prosecution: and, in obedience to those instructions, he conducted it throughout; and the expenses were paid out of the funds of the City.

considered as a prosecutor. And a side bar rule taken out to tax the costs was set aside

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Hugh Hill now shewed cause. Stat. 5 & 6 *W. & M.* c. 11. s. 3. was much considered in *The Queen v.* — (a). In that case *Lord Campbell C. J.* asks: "Does not it concern those to prosecute whose duty it is to do so, though the duty be only one of imperfect obligation?" In the present case, it can not be doubted that the Lord Mayor, the chief magistrate of the City, in directing the city solicitor to conduct this prosecution, did perform a duty, though perhaps only one of imperfect obligation. [*Coleridge J.* I do not find that the Lord Mayor did prosecute in this case. He directed the city solicitor to prosecute; but he did nothing to make himself personally liable for the costs. In *Rex v. Cook* (b), in which I was concerned when at the bar, a rule to tax the costs of a prosecution was discharged, not on the ground that it was not the duty of the officers to prosecute, but because the expenses of the prosecution were defrayed by public subscription. It would seem that the object of stat. 5 & 6 *W. & M.* c. 11. s. 3. was to indemnify a certain class of prosecutors; and that, to bring a case within it, there must be some such prosecutor, personally liable for those costs, to be indemnified.]

Sir *Frederick Thesiger* was not called upon to support his rule.

LORD CAMPBELL C. J. I regret very much that the costs of this prosecution cannot be recovered from the defendant. There is no doubt that the conduct of the

(a) 15 Q. B. 1060.

(b) See post, p. 599, note (c).

Lord Mayor in instructing the city solicitor to conduct the prosecution was most laudable: and, had the prosecution not been so conducted, there would most probably, have been a failure of justice; but we are bound by the rules of law, and cannot give the costs of the prosecution, however laudable, unless the case is brought within stat. 5 & 6 W. & M. c. 11. s. 3. (a). The object of that statute was to indemnify a class of prosecutors against the costs of prosecutions which it was their duty to institute. In *Regina v.* — (b) the prosecution was by the Guardians of the Union, who were personally liable for the costs of the prosecution, which they could not have charged to the parish. But *Rex v. Cook* (c) cited by my brother *Coleridge*, decides conclusively that, the object of the statute being to indemnify the prosecutor, there must be a prosecutor liable to the expenses, or the case is not within the statute. Now, in the present case, the Lord Mayor was not liable: therefore this case is not within the statute.

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COLERIDGE J. and WIGHTMAN J. concurred (d).

Rule absolute (e).

(a) Extended by stat. 5 & 6 W. 4. c. 33. s. 3. to the recognisances provided for by that section.

(b) 15 Q. B. 1060.

(c) See note (e) *infra*.

(d) *Crompton J.* was absent on account of a domestic calamity.

(e) *Rex v. Cook* is reported in 1 *Man. & Ry.* 526; but at the time of the argument in the principal case it was supposed not to be reported.

Mr. *Robinson*, the Master of the Crown Office, has kindly furnished the reporters with the following extract from his notes of that and another case.

1827. *Rex v. Cook*, on the prosecution of churchwardens &c. of parish in *Exeter*.

Indictment (for disinterring dead bodies) removed from sessions by certiorari. Conviction. Prosecutor held not entitled to costs under the

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statute, it being shewn by affidavit that the expenses of the prosecution were defrayed by subscription: and the side bar rule taken out for taxing the costs was discharged.

Rez v. Davies. Indictment for like offence on prosecution by father of the deceased.

Prosecutor, in like manner, held not to be entitled to costs, because he was not real, but nominal, prosecutor, prosecution being carried on by subscription. And side bar rule for costs discharged. 13 May, 1830. See also *Regina v. Williams*, 6 Q. B. 273.

Thursday,
January 27th.

The QUEEN against THOMAS GREGORY.

At a municipal election, a voting ticket signed 'W. J. of K. Street' was rejected, on the ground that the qualification of W. J. on the burgess roll was described as 'House in M. Street.' It was shewn by affidavits that K. Street and M. Street intersect; that the house in question was the corner house; that it was one house, with a street door in each street, consisting of what had formerly been two distinct houses, one in each street, and one of them being the house in M. Street. Held: that the description was such as to be commonly understood within the meaning of stat. 5 & 6 W. 4. c. 76. s. 142., and that the vote was improperly rejected.

COWLING, in Michaelmas term 1852, obtained a rule

Nisi for a quo warranto against the defendant, for exercising the office of councillor for the *Abbey Ward* in the borough of *Reading*. Two councillors were elected for this ward on 1st November 1852. At the election, there were four candidates, of whom the defendant *Gregory* and *James Philips* were two. Several votes tendered were rejected. One of the other candidates had a clear majority, and was elected. *Gregory* and *Philips* had an equal number of the votes received; and the presiding alderman and one of the assessors named *Gregory* as the person elected. The rule was obtained on the ground that the vote of a burgess called *William Pearce Ivey*, tendered for *Philips*, was improperly rejected. The voting paper was signed "William Pearce Ivey, of King Street, in the parish of St. Lawrence." On the burgess roll, *Ivey's* qualification was inserted as

"House. *Minster Street*, in the Parish of *St. Lawrence*."

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From the affidavits, on both sides, it appeared that *Minster Street* and *King Street* intersect. Mr. *Ivey*, in 1844, occupied the house No. 63 in *Minster Street*, which was that next to the intersection of the two streets; his name was then entered on the burgess roll by the description, which still remained unaltered. In 1848 he purchased the house No. 8 in *King Street*, which was the corner house in *King Street* and adjoining to the house No. 63 in *Minster Street*. He threw down the division between the two, and from that time occupied both, as one house, with two street doors, one being the door No. 63 in *Minster Street*, the other door No. 8 in *King Street*.

Phipson now shewed cause. Stat. 5 & 6 W. 4. c. 76. s. 32. enacts that the votes shall be given by a paper, "such paper being previously signed with the name of the burgess voting, and with the name of the street, lane, or other place in which the property for which he appears to be rated on the burgess roll is situated." Reliance will no doubt be placed on sect. 142, which enacts "that no misnomer or inaccurate description of any person, body corporate, or place named in any schedule to this Act annexed, or in any roll, list, notice, or voting paper required by this Act, shall hinder the full operation of this Act with respect to such person, body corporate, or place, provided that the description of such person, body corporate, or place be such as to be commonly understood." The description in the voting paper is not an inaccurate description of the house 63, *Minster Street*, for which the voter was rated and

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placed on the roll in 1844, but an accurate description of the house No. 8, *King Street*, which he has subsequently acquired. [*Wightman J.* When he turned the two houses into one the accurate description became "the house situate in *Minster Street* and in *King Street*, being No. 63 in the one, and No. 8 in the other." But the description in the burgess roll and that in the voting paper would both be commonly understood to mean that. Lord *Campbell C. J.* As soon as it appears that in fact the houses are one the case is at an end.]

Cowling was not called upon.

Per CURIAM (a). The rule must be absolute.

Rule absolute.

(a) Lord *Campbell C. J.*, *Coleridge* and *Wightman J.* *Crompton J.* was absent on account of a domestic calamity.

Friday,
 January 28th.

CORNISH and PROUT *against* HOCKIN.

A writ was continued, under stat. 2 & 3 W. 4. c. 39. s. 10.; but the indorsement on a pluries contained an erroneous date of the first writ, and the same mistake was made on

the copy served. Afterwards stat. 15 & 16 Vict. c. 76. passed. The Statute of Limitations had run against the plaintiff, and had been pleaded. The Court permitted the indorsement on the writ to be amended, but not the indorsement on the copy served. *Semble*, that the amendment might have been allowed independently of stat. 15 & 16 Vict. c. 76. s. 222.

M. CHAMBERS, in last *Michaelmas* term, obtained a rule calling on the defendant to shew cause why the plaintiff should not be at liberty to amend the indorsement on the last writ issued herein on 28th May 1851, and on the copy of the said writ served on defendant, of the date of the first writ, by substituting the 13th instead of the 22d day of *October* 1849,

which latter day was inserted by mistake; and why defendant should not produce the said copy of the said writ for that purpose.

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The rule was obtained on affidavits stating the following facts. The action was brought upon a promissory note for 200*l.*, dated 23rd *October* 1843, purporting to be made by defendant, payable to *George Bridgman* or order, and by him indorsed to plaintiffs and *Francis Cornish Newman*, since deceased. A writ was issued on 13th *October* 1849, and the process had been regularly continued, in accordance with stat. 2 & 3 *W. 4. c. 39. s. 10.*; except that, on the fifth writ (pluries), dated 28th *May* 1851, the indorsement stated, by mistake, the date of the first writ to be 22d of *October* 1849, instead of 13th *October*. The same mistake was made on the copy served on defendant. The declaration was filed on 29th *July* 1852: defendant had pleaded the Statute of Limitations.

Crowder and *Phinn* now shewed cause. This amendment is not warranted by sect. 222 of The Common Law Procedure Act, 1852, 15 & 16 *Vict. c. 76.*, nor by the state of the law before that Act. As to the previous law. These writs were, it is true, issued properly as to time, in fact: but the indorsement is as necessary as the body of the writ to connect the action with the first issuing of process. In *Medlicott v. Hunter* (a) the Court of Exchequer refused to permit such an amendment as that now asked for, *Parke B.* saying that the indorsement must be on the writ at the time of service. In *Roberts v. Bate* (b) the Court of King's Bench refused

(a) 5 *Exch.* 34.(b) 6 *A. & E.* 778.

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to grant an amendment for the purpose of aiding a party who would otherwise be barred by the Statute of Limitations. In *Campbell v. Smart* (a) an application was made to the Court of Common Pleas to alter the date of a summons for the same purpose: but it was refused. In the last case, reference was made to *Lakin v. Watson* (b); but *Wilde* C. J. said that he thought *Roberts v. Bate* (c) was the better decision of the two. The authority of *Medlicott v. Hunter* (d) was recognised and acted on, in *Pritchard v. Bagshawe* (e), by the Court of Common Pleas. [Erle J. There seems to me to be an important distinction between amending so as to make the case conformable to the fact, and amending contrary to the fact.] In *Medlicott v. Hunter* (d) the amendment would have been in conformity with the fact. Next, as to stat. 15 & 16 Vict. c. 76. s. 222. That enactment is not retrospective. If the amendment were allowed, the defendant would be deprived of his right under the Statute of Limitations, which was vested before the Common Law Procedure Act passed. In *Moon v. Durden* (g) the Court of Exchequer decided that stat. 8 & 9 Vict. c. 109. s. 18., which enacted that no suit should be brought or maintained for a wager, did not defeat an action already commenced: and the Court acted upon the maxim, cited in 2 Inst. 292, “Nova constitutio futuris formam imponere debet, non præteritis.” To warrant a departure from this rule, the intention of the Legislature must be very plain; *Hitchcock v. Way* (h). Therefore, under the statute now in

(a) 5 Com. B. 196.

(b) 2 Cr. & M. 685.

(c) 6 A. & E. 778.

(d) 5 Exch. 34.

(e) 20 L. J. N. S. C. P. 161.

(g) 2 Exch. 22.

(h) 6 A. & E. 943.

question, 15 & 16 *Vict. c. 76.*, the Court of Exchequer decided that sect. 51 did not affect a special demurrer where there had been a joinder in demurrer before the Act came into operation; *Pinhorn v. Souster* (a). The same principle prevailed in *Regina v. Crowan* (b). In that case, *Coleridge J.* pointed out an important distinction: "It might be that, if all had been done rightly up to the time when the statute came into operation, the statute would have applied to omissions occurring afterwards in the same proceeding: but here all the defect, if it be one, existed before the operation of the statute, and therefore cannot be cured by it." Here the defect existed before the statute came into operation. Suppose the rule to be made absolute, the defendant may still insist on the defect: for the writ, when produced, will shew the erasure. [*Coleridge J.* It will then be as if the indorsement had always been as amended.] Sect. 10 repeals the provisions of stat. 2 & 3 *W. 4. c. 39.*, in respect of the proceedings taken to prevent the operation of statutes of limitation, "except so far as may be necessary for supporting any writs that have been issued before the commencement of this Act, and any proceedings taken or to be taken thereon." Here the plaintiff relies exclusively on the proceedings taken in conformity with stat. 2 & 3 *W. 4. c. 39.*: if he abandons these, he has no answer to the Statute of Limitations: if he insists on them, he is within the above exception.

M. Chambers, contra. The decisions as to the law before the statute were conflicting. If the indorsement be not amended, the defendant will be barred by the

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(a) 8 *Exch.* 138.(b) 14 *Q. B.* 221.

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Statute of Limitations; *Williams v. Williams* (a). In general, where amendments have been refused, the attempt has been to introduce something contrary to the fact. In *Culverwell v. Nugee* (b) the Court of Exchequer, in order to save the Statute of Limitations, amended an alias and pluries writ of summons, by allowing an indorsement of the dates of the first writ and return thereto to be inserted. The same Court, in *Carne v. Malins* (c), allowed an amendment by inserting the names of fresh parties, in order to save the Statute of Limitations. But, further, stat. 15 & 16 *Vict. c. 76. s. 222.* is applicable. The preamble to the section states that the power of amendment then vested in the Judges was "insufficient to enable them to prevent the failure of justice by reason of mistakes and objections of form." The words "any proceeding in civil causes" comprehend proceedings pending. Sect. 10 repeals the provisions of stat. 2 & 3 *W. 4. c. 39.* respecting the direction of writs, except so far as necessary for "supporting" proceedings taken before the Act. The object was not to preserve the mischief of defects of form, but to prevent parties from being defeated by the statute. The plaintiff's right is rather supported than impeached by the dictum of *Coleridge J.* which has been cited: he had a vested right of action from the first. It is said that the defendant had a vested right of defence: but that mode of limiting the effect of a statute was attempted, and failed, in *Towler v. Chatterton* (d). The inclination of the Court will be to aid in extending, rather than contracting, the effect of an enactment introduced for the purpose of simplifying and amending legal proceed-

(a) 10 *M. & W.* 174.(b) 15 *M. & W.* 559.(c) 6 *Exch.* 803.(d) 6 *Bing.* 258.

ings, in conformity with the aphorism of *Plowden*, cited at the end of the Fourth Institute.

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LORD CAMPBELL C. J. I have a difficulty in making the rule absolute as drawn up. The copy served on the defendant is not part of our record; and we should be ordering a fiction, by making it appear that he had been served with the indorsement as amended; which I abstain from doing. But I think the rest of the rule may be made absolute. I need not analyze the decisions before The Common Law Procedure Act, 1852: they are conflicting. But I rely on sect. 222 of that Act, which really meets this case. The facts are that the debt would have been barred on 22d *October* 1849; a writ was therefore sued out on 13th *October* 1849, and regularly continued. Each pluries was in very good time; but one of them had a clerical mistake in the indorsement, the 22d of *October* being inserted, contrary to the fact. If this error stand, it prevents the plaintiff from taking advantage of the writs which have been regularly sued out. But, if we may amend according to the fact, the Statute of Limitations will not defeat the plaintiff. Then does not the Act give us power to amend our own record? The writ is our own record; and we have the first writ to amend by. Now, when we take the words of sect. 222 with the preamble, to which Mr. *Chambers* properly referred us, and when we find that we may amend, "whether there is anything in writing to amend by or not," "for the purpose of determining in the existing suit the real question in controversy," we find that we have a suit existing, and the real question is, whether or not it is

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barred by the Statute of Limitations. May we not order such an amendment as to raise that question? Mr. *Phinn* says that the amendment will be inoperative. We, however, make the alteration: and, as at present advised, I think it will be effectual. Stat. 2 & 3 W. 4. c. 39. s. 10., as to this point, contains nothing respecting the service of the copies of the successive writs: it directs only that the writs themselves shall have the indorsements. Mr. *Phinn* may try to maintain his objection at the trial: but the pluries will then contain an indorsement corresponding with the original writ.

COLERIDGE J. concurred.

WIGHTMAN J. It may be that, even if we had no authority for this amendment before the statute, we should have thought we had it under the statute. But there are two decisions before the statute in favour of our power to amend.

ERLE J. I am also of opinion that the rule should be absolute to amend the indorsement of the writ: and I think that we should have been justified in doing this before the statute: a fortiori we are so now. We can look at our own records, and correct what we see to be a clerical error. It is said that the defendant had a vested right, because, if there be no amendment, he may defeat the plaintiff by means of the Statute of Limitations. But every amendment of a fatal defect takes away the right of the party insisting on the defect. We need not amend the copy: the indorsement on the writ, as amended, will prevent a variance, the replication

being framed according to the amendment of the pleadings made in *Williams v. Williams* (a). In *Culverwell v. Nugee* (b) the Court of Exchequer say that they had been in error in refusing to exercise the power of amendment. In some cases, the amendment has been refused because it would introduce an untruth: that is not so here.

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Rule absolute to amend the indorsement
on the writ, on payment of costs.

(a) 10 M. & W. 174.

(b) 15 M. & W. 569.

The Queen. The Bishop of Chichester 29 L J 2 B 25-

Ex parte MEDWIN and HURST.

Friday,
January 28th.

A CITATION issued, on the 13th October 1851, out of the Consistorial and Episcopal Court of the diocese of *Chichester*, in the name of the Bishop of *Chichester*, citing *Pilfold Medwin* and *Robert Henry Hurst* to appear before *Robert Joseph Phillimore LL. D.*, or some other competent judge in that behalf, on 15th October then next, to answer *John Turner Rawlinson* in a cause of perturbation of seat or pew in the parish church of *Horsham*. *Medwin* and *Hurst* appeared; the proceedings went on; and the libel was admitted to proof; and (after an ineffectual appeal to the Arches) the witnesses were examined in support of the libel; and cross interrogatories were administered. These were published on 4th August 1852, when *Medwin* and *Hurst* first learned from them that the Bishop of *Chichester* had advised and concurred in the suit, and had gua-

It is no ground for prohibiting a cause before the Chancellor of a diocese in the Consistorial Court of the diocese, that the Bishop of the diocese is interested in the cause.

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ranteed *Rawlinson's* costs (a). A decree was pronounced against *Medwin* and *Hurst* on 3rd September 1852. By the practice of the Ecclesiastical Courts *Medwin* and *Hurst* had no means of removing the suit from the Consistorial Court without the consent of the opposite party: and they had in fact asked for such consent; but it had been refused. They were not aware of the nature of Dr. *Phillimore's* appointment till after the decree: and they then obtained a copy, after a correspondence and some delay. The appointment is in the name of the present Bishop, and is by patent, to the tenor that "We, regarding" &c., "do, for us and our successors, give, grant and confirm to our beloved in Christ, *Robert Joseph Phillimore* D. C. L., during his natural life, the office or offices (hereinafter and in the manner herein-after defined) of our Vicar General in Spirituals in and through the whole Archdeaconry of *Chichester*, and Official Principal or President of our Consistory Court within the Archdeaconry aforesaid, wheresoever constituted or to be constituted; which said office is now vacant" &c. "And we do by these presents ordain, constitute and make him our Chancellor and Vicar General in Spirituals, and Official Principal of our Episcopal and Consistory Court of *Chichester*, with power of surrogating, substituting, constituting and making any other and others fit person or persons in his stead and place in this behalf, as often as he shall otherwise happen to be hindered, and of recalling or removing them as often as need shall be. Nevertheless, and in either case, consulting us and our successors, and having first our

(a) It appeared that the Bishop's object had been to prevent the buying and selling of the rights to pews, and to enable the parishioners to make use of them.

consent and approbation. Moreover we do, for us and our successors, give, grant and confirm unto the said *R. J. P.*, during his natural life, that, in our absence from our Consistory Court of *Chichester*, he shall and may proceed, by himself, his assignee or substitute, assignees or substitutes, as well in all and singular causes, businesses, suits and complaints, Spiritual and Ecclesiastical, at the instance or promotion of whatsoever parties, as by our mere or mixed office, also in all Matrimonial causes and complaints of divorce and nullity, and causes of Dilapidation of the goods of the Church, and Robbing of churches, and in all other business and causes whatsoever (except hereinafter excepted) in our Episcopal Consistory Court of *Chichester* moved or to be moved (the cognizance and decision whereof is known by law or custom of the realm to belong to our Ecclesiastical Court); and decide and finally determine all and singular those the causes aforesaid (except hereinafter excepted), with all the rights thereto incident, issuing, depending, annexed and connexed (without breach of the laws and statutes of this excellent kingdom): nevertheless, first consulting us and our successors, and having our consent, in case either party earnestly crave our judgment." Power was also given to visit, to punish excesses of clergy or laity, "except notwithstanding and always reserved to us and our successors the complaints and supplications hereafter to be made by whatsoever clergy in all and singular causes, and reserved also to us and our successors equally to examine and determine every cause in our proper person in our Court of Consistory." Then followed other powers, not material to the present question. "Moreover we" "do by these

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presents, for us and our successors, give, grant and confirm unto the said *R. J. P.*, during his natural life, the office and offices of Commissary General (reserving always the exceptions and limitations aforesaid, in and through the whole Archdeaconry of *Chichester*)", and also the offices of Sequestrator, Administrator General, with approbation and registration of testaments &c. Signed and sealed by the Bishop; dated 29th *October* 1844. Confirmation by the Dean of *Chichester*, by his signature, and under the common seal of the Dean and Chapter; dated 26th *November* 1844.

Creasy now moved, on affidavit of the above facts, for a prohibition to Dr. *Phillimore* and the Bishop of *Chichester*, to prohibit the Consistory Court from proceeding. The interest which the Bishop has in this case, in consequence of his having guaranteed the costs, disqualifies the Court from acting. His interest arises from his having taken a conscientious step: but it does not the less disqualify him. *Dimes v. The Grand Junction Canal Company* (a) shews how strictly the rule is enforced which excludes Judges from acting in a matter in which they have an interest. The authorities there adduced by *Parke* B. shew the principle very strongly. The irregularity appears on the face of the proceedings; and the application may therefore be made after sentence. [Lord *Campbell* C. J. Does the irregularity appear in the sentence?] It does not; but it appears in the citation; and that is sufficient. The affidavits shew that the party had no knowledge of the Bishop's interest before sentence. It seems, from the

(a) In the House of Lords, *June* 26th and 29th, 1852. Not yet reported.

language of *Parke B.* in *Roberts v. Humby* (a) (citing *Buggin v. Bennett* (b)), that this would authorize the prohibition, even if the defect did not appear on the face of the proceeding. The means of resorting to a higher tribunal are provided for by stat. 23 *H. 8. c. 9.*; as they are in the Church Discipline Act, 3 & 4 *Vict. c. 86* (c). From the appointment of Dr. *Phillimore* it appears that he is the Bishop's deputy. That the interest of the principal disqualifies the deputy from acting appears from *The City of London v. Wood* (d). [*Wightman J.* The Court was there nominally the Court of the Mayor and Aldermen, and the parties interested were the Mayor and Commonalty: here, at any rate, the tribunal is not nominally that of the Bishop. *Coleridge J.* It is said in *Burn* (e) that, in a matter of contentious jurisdiction, a Bishop may sue before his own Chancellor.] The appointment here reserves to the Bishop the right to hear in certain cases.

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Cur. adv. vult.

Lord CAMPBELL C. J., on a later day in this term (*January 31st*), delivered the judgment of the Court.

This was an application, after sentence, for a prohibition to the Consistory Court of the Bishop of *Chichester*, on the ground of the Judge being interested in the result of the suit. The interest alleged was not in Dr. *Robert Phillimore*, the Chancellor, who actually tried the case and pronounced the decree; but in the Bishop, who, upon grounds admitted to be entirely disinterested,

(a) 3 *M. & W.* 120, 126.

(b) 4 *Burr.* 2035, 2037. See also 2 *Inst.* 602; *Gorham v. Bishop of Exeter*, 15 *Q. B.* 52, 64, 65.

(c) See sect. 13.

(d) 12 *Mod.* 669, 672.

(e) *Eccle. L.* vol. 1, p. 293. tit. *Chancellors*, sect. 6.

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was stated to have guaranteed to the promovent his expenses, because, under the circumstances, he thought that neither he, nor the parishioners, whose interests were really to be advanced, ought to bear them. It was argued that the Court was really the Bishop's Court, and he really the Judge, the Chancellor only being his deputy; and that this interest in the costs which might by the decree have been imposed on him was sufficient ground for the interference of this Court.

The law is wisely jealous on this head: and the slightest real interest in the issue of a suit incapacitates any one from acting as Judge in it, although it may be certain that in fact the interest, from its real or proportionate insignificance, cannot create any bias in his mind. But then it must be a real interest. And, when the facts are such as have been stated above, this Court is bound, especially after sentence and where no indirect motives or practices are imputed, to see clearly that the objection is made out in fact.

As the application for the rule was rested mainly on the language of Dr. *Robert Phillimore's* appointment, we desired to look at it before we granted or refused the rule. We have now examined it. And it appears to constitute him, among other things not now material, Chancellor, Vicar General in Spirituals, and Official Principal of the Episcopal and Consistory Court of *Chichester*, with power of surrogating a fit person for his substitute with the Bishop's approbation. The appointment is for life: and, in large terms, the power is conferred on him, in the absence of the Bishop, of presiding in the Consistory Court in all cases within the contentious jurisdiction of the Bishop, with certain exceptions not material now: and, at the prayer of either party in a

suit for the personal judgment of the Bishop, he is to consult him and have his consent to the decree.

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The Court, therefore, is in style the Bishop's Court, as this is the Queen's: and the Chancellor is the Bishop's Chancellor, as we are the Queen's Judges. By a special provision, at the prayer of the party, the Bishop's judgment may be invoked; in which respect the analogy fails. But, where this prayer is not made, the Chancellor, or Official Principal, seems to be an independent Judge: nor is he the less so, because some cases are excepted from his jurisdiction, nor because that jurisdiction ceases, or is suspended, when the Bishop is present. If absent, the Bishop cannot interfere: the parties are never supposed, by the citation or other proceedings, to be before him; nor is there any appeal from the Chancellor to him.

Ayliffe (Parergon 160) says: "A Chancellor as distinguished from a Vicar General, Commissary and Principal Official, is he, that has that *cognizance of all causes* both of voluntary and contentious jurisdiction committed to him; whereas properly speaking, a Vicar General has only all causes of voluntary jurisdiction delegated to him; and a Principal Official, only causes of contentious jurisdictions granted him." And, again, p. 163, he says: "It has been said, that a Bishop's Official or Chancellor, is he, to whom the Bishop delegates the cognizance of causes *in a general manner*; and as such, an Official or Chancellor, has the same consistorial audience with the Bishop himself that deposes him: an appeal does not lie from such an Official to the Bishop himself, but to him only unto whom it ought to be appealed from the Bishop himself: But 'tis not the same thing in Commissaries, who are not principal officials, tho' deputed

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to an universality of causes in a certain part of the diocese; because a *principal official is an ordinary, and the other only a delegated Judge.*" This passage is not very accurately expressed: but the meaning is sufficiently clear in one sense. The Chancellor, or the Official, has a delegated power as much as the Commissary; because they equally receive from the Bishop a power which was originally in him, and which originally he might have exercised himself, and probably often did. But it was a power to be exercised in a Court, open to the subjects of the diocese, for the trial of all causes over which he has jurisdiction. And of this Court he appoints the Chancellor or Official to be the ordinary Judge, to act therein independently of his controul, with no special instructions, according to ecclesiastical law. Whereas the Commissary is deputed specially, his powers varying according to the limits of his commission, as to subject matter, time and place, and is purely the deputy of the Bishop. The Bishop *must* appoint a Chancellor or Official Principal, and may be compelled to do so by the Archbishop: it is at his option when, upon what occasions, and for what purposes, he will or will not appoint Commissaries.

This distinction, Bishop *Gibson* observes (*a*), the common law Courts have recognised. And a strong instance is the case of *The Bishop of Lincoln v. Smith* (*b*), in which a prohibition was moved for because the Bishop sued for a pension in his own Court held before his Chancellor; and it was refused by the Court of Queen's Bench, consisting of *Keyling* and *Twisden*, who decided

(a) *Codex*, vol. 2. p. 986. note (f). (2nd ed.). Title xliii. c. 2.

(b) 1 *Ventr.* 3.

that, "being held before the Chancellor, and not the Bishop himself, he might sue there."

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The objection being thus disposed of, it is unnecessary to examine more attentively the affidavits to see whether in truth the interest in the Bishop was such as would have warranted the application, or whether the parties have not waived it by delay. On these points we express no opinion.

Rule refused.

The QUEEN *against* The Mayor and Assessors of
the Borough of HARWICH.

Thursday,
January 27th.

O'MALLEY, in *Michaelmas* term 1852, obtained a rule nisi for a mandamus commanding the Mayor and Assessors of the Borough of *Harwich* to revise the list of Burgesses of the said Borough of *Harwich*, so far as regards the vote of *James Broom* the younger. The affidavit shewed that the name of "*James Broom* the younger, of *Currants Lane*, in the parish of *St. Nicholas*," was inserted in the burgess list. He was objected to. The notice of objection left with the town clerk was in the terms following.

"To the town clerk of the borough of *Harwich*.

"I hereby give you notice that I object to the name of *James Broom* the younger, of *Currants Lane* in the

A burgess objected to the name of *J. B.* of *A.* being retained on the burgess list for the borough of *H.* He had given notice of the objection to the town clerk in the precise form given in No. 3, Schedule (D.) to stat. 5 & 6 W. 4. c. 76. The notice delivered to the person objected to was "To Mr. *J. B.* I hereby give you notice that I object to

your name being retained" &c. The mayor and assessors refused to hear the objection, on the ground that this latter notice was insufficient. Held, that the notice was to the like effect with the form No. 3. Schedule (D.), and that the objection ought to have been heard.

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parish of *St. Nicholas*, being retained on the burgess list of the borough of *Harwich*."

That left with the person objected to was in the following terms.

"To Mr. *James Broom* junior. I hereby give you notice that I object to your name being retained on the burgess list of the Borough of *Harwich*."

The Mayor and Assessors thought the notice insufficient, and refused to hear the objection.

Shce Serjt. now shewed cause. Stat. 5 & 6 W. 4. c. 76. s. 18. requires the mayor and assessors to retain on the lists "the names of all persons to whom no objection shall have been duly made." Sect. 17 shews how the objection is to be made: the objector is to "give to the Town Clerk of such Borough, and also give to the person objected to, or leave at the premises for which he shall appear to be rated in the burgess list, notice thereof in writing according to the form number 3. in the said schedule (D.) or to the like effect." The form number 3. is as follows.

"To the Town Clerk of the Borough of [or to
the person objected to, as the case may be].

"I hereby give you notice, that I object to the name of *Thomas Bates* of *Brook's Farm* in the parish of [describe the person objected to as described in the burgess list] being retained on the burgess list of the borough of ."

The notice given to *James Broom* was, not that an objection would be made to retaining the name of *James Broom* the younger, as described in the burgess list, but to retaining "your name." That is not to the like

effect. [Lord Campbell C. J. This notice gives all the information which the Legislature intended to be given by the form in schedule (D.), and is therefore "to the like effect."']

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PER CURIAM (a).

Rule absolute (b).

(a) Lord Campbell C. J., *Coleridge* and *Wightman* Js.

(b) In *Regina v. Mayor, &c. of Harwich*, 1 *Low. & M.* 95., *Crompton* J., in the Bail Court, on a similar case, had given a decision contrary to that in the text.

MELLOR *against* LEATHER and CLOUGH.

REPLEVIN, for taking the cattle, &c., to wit one cream coloured horse, of plaintiff, and unjustly detaining, against sureties and pledges, &c.

Pleas by *Leather*: 1. That *Leather* did not take &c. in manner &c. Issue thereon. 2. That the cattle &c. were the property of *Leather*, and not of plaintiff: verification. Replication: that the cattle &c. were the property of plaintiff and not of *Leather*: conclusion to the country. Issue thereon.

Plea by *Clough*. That *Clough* did not take &c. in manner &c. (by statute). Issue thereon.

On the trial, before *Wightman* J., at the *Liverpool* Summer Assizes 1852, it appeared that *Clough* was a policeman for the borough of *Liverpool*. The defendant

Upon an issue joined on a plea of Non cepit in an action of replevin, defendant, under stat. 5 & 6 W. 4. c. 76. ss. 76., 133., may shew that he was a constable appointed for a borough under sect. 76., and took the goods within the county wherein the borough is situate, but without the borough, on a charge that they had been stolen.

Replevin lies for goods unlawfully

taken: the remedy is not confined to the case of goods taken by way of distress.

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Leather being in possession of a horse which the plaintiff claimed as his property, the plaintiff sent a man named *Harrison* to take possession of it. *Harrison* did so, and gave it to plaintiff. Upon this the defendant *Leather* charged *Harrison* with stealing the horse: and, upon this charge, *Clough*, to whom it was made, caused *Harrison* to be apprehended, and took possession of the horse, which was in the county of *Lancashire*, but not in the borough. *Harrison* was brought before the police magistrate at *Liverpool*, who, it appearing to him that the horse had been taken upon a bonâ fide claim of property, dismissed the charge against *Harrison*, but directed the defendant *Clough* to give up the horse to the defendant *Leather*, which was done (a). This action was brought for the original taking by *Clough* and *Leather*. For the defendants it was contended that replevin could not be brought upon these facts; and for *Clough* it was contended also that he was not liable to the action, having taken the horse in the performance of his duty, upon the charge of felony, and detained it no longer than his duty required. For the plaintiff it was argued that *Clough* could not set up this justification under the plea of Non cepit. In answer to this, stat. 5 & 6 W. 4. c. 76. ss. 76., 133. was relied on (b). The learned Judge reserved leave to move for a verdict for both defendants upon the first objection and for *Clough* upon the second; and left the question of property to the jury. Verdict for plaintiff on all the issues.

(a) Under sect. 293 of the local Act mentioned in the next note.

(b) The counsel for *Clough* relied also on the provisions of stat. 6 & 6 Vict. c. cvi., Local and personal, public; "For the improvement, good government, and police regulation of the borough of *Liverpool*:" but, the judgment of the Court having been given independently of this Act, it is not further noticed in the report.

In last *Michaelmas* term, *Edward James* obtained a rule *Nisi* to enter a verdict for defendant *Clough*. In the same term (a),

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Wilkins Serjeant and *Burnie* shewed cause. The defendant *Clough* is not within the protection of stat. 5 & 6 *W. 4. c. 76. ss. 76., 133.* Reliance will be placed on *Hazeldine v. Grove* (b). That case decided that a justice of the Metropolitan Police Courts, appointed under stat. 2 & 3 *Vict. c. 71. s. 1.*, was entitled to the protection which sect. 53 of that statute gives in the case of any thing done in pursuance of that Act or in the execution of the powers or authorities under the Act, where the action was brought against a justice for a thing done in the exercise of the ordinary jurisdiction of a justice: and it will be contended that the words of sect. 133 of stat. 5 & 6 *W. 4. c. 76.*, "for any thing done in pursuance of this Act," will therefore protect constables appointed under sect. 76 of the Act, though they are exercising the ordinary powers of a constable. That case was nearly contemporaneous with *Shatwell v. Hall* (c). There it was held that constables, appointed under a local Act, were not within the protection of a clause of the Act relating to "any thing done in pursuance of this Act," in respect of the execution of a duty falling within the ordinary duty of constables, and not resting upon the special powers given by the Act. And it should seem that whatever special protection the constables of the borough have under stat. 5 & 6 *W. 4. c. 76.* must be limited to acts done within the borough: in respect of acts done without the borough

(a) November 13, 1852. Before Lord Campbell C. J., *Wightman* and *Erls* Js.

(b) 3 Q. B. 997.

(c) 10 M. & W. 523.

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they are, by sect. 76, entitled only to such powers and privileges as constables have by the general law of the realm, common or statutory. In *Eliot v. Allen* (a) the Court of Common Pleas acted upon *Shatwell v. Hall* (b), but considered that case not irreconcilable with *Hazeldine v. Grove* (c). As to the question whether replevin lies, that is a remedy not confined to goods taken for a distress for rent. *Jones v. Johnson* (d) is an authority in support of the action. There no objection was made to the action of replevin against a party actually taking. In *George v. Chambers* (e) the objection was taken and failed.

Edward James and *Milward*, contra. Sect. 133 of stat. 5 & 6 W. 4. c. 76. gives protection to the constables "acting in the execution" of the powers conferred by their appointment under sect. 76. Sect. 78 somewhat enlarges the constables' powers and duties: at any rate the defendant here was exercising, out of the borough, in the county, powers which, but for the enactments of the statute, he would not have possessed at all, but which the statute gives to him in the county. The case is thus directly within the authority of *Hazeldine v. Grove* (c). *Shatwell v. Hall* (b) may be distinguished, on the ground that the words "in pursuance of this Act" were inapplicable to an act of the constables which did not require a warrant; the power given to the constables, by the Act there in question, being only that of executing a warrant. *Eliot v. Allen* (a) appears to have been rather hastily decided. The distinction which is suggested, in the judgment of *Maule J.*, between that

(a) 1 Com. B. 18.

(b) 10 M. & W. 523.

(c) 3 Q. B. 997.

(d) 5 Exch. 862. 875.

(e) 11 M. & W. 149. See *Allen v. Sharp*, 2 Exch. 352.

case and *Hazeldine v. Grove* (a) seems to be that "done in pursuance of this Act" is a more restricted phrase than "done" "in the execution of the powers or authorities under this Act." If that distinction can be supported, it is in favour of the defendant here; for the words of sect. 133 of stat. 5 & 6 W. 4. c. 76. are inserted expressly "for the protection of persons acting in the execution of this Act." The authority of *Hazeldine v. Grove* (a) is strengthened by the consideration that the magistrates there had also a distinct protection by an earlier statute; yet this did not defeat their right to avail themselves of the later statute. That case was acted upon in *Barnett v. Cox* (b). Further, sect. 76 gives to the borough constables the privileges which "any constable" "hereafter may have" "by virtue" "of any statutes made or to be made." Stat. 2 & 3 Vict. c. 93. is a statute made since: and the borough constables have therefore, under sect. 8 of the Act last mentioned, the privileges which special constables have under stat. 1 & 2 W. 4. c. 41. s. 19., which enables them to give the special matter in evidence under the general issue (c). They are also under the protection of a similar clause in the Metropolitan Police Act, 10 G. 4. c. 44. s. 41. Next, the action of replevin will not lie. [Lord Campbell C. J. Under what issue can you raise that question?] Under the issue on Non cepit. That is the general issue in replevin: under Not guilty in trespass it might be shewn that the action was miscon-

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(a) 3 Q. B. 997.

(b) 9 Q. B. 617.

(c) The counsel referred to a case tried at the *Liverpool* Spring Assizes, 1845, and afterwards argued before *Coltman* and *Wightman* Js., as justices of the Common Pleas at *Lancaster*; in which it was held that a constable appointed under stat. 2 & 3 Vict. c. 93. was entitled to notice of action, by virtue of sect. 8 of that Act and sect. 19 of stat. 1 & 2 W. 4. c. 41.

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ceived. This is, in fact, an action of trespass unless replevin lies. [*Erle J.* Then you ought to have pleaded Not guilty.] Non cepit is merely an informal plea of Not guilty. Replevin lies against a magistrate only where he has acted without jurisdiction; *Wilson v. Weller* (a). The constable was bound to take charge of the goods said to have been stolen; 1 *Tomlins's Law Dict.* tit. *Constable*, IV. [*Wightman J.* In *Pearson v. Roberts* (b) *Willes C. J.* says that there are two sorts of replevin; one to have the goods, the other to recover damages.]

Lord CAMPBELL C. J. This case has been very well argued; and the Court is much obliged to the learned counsel. As to the question whether replevin lies, I feel no difficulty in saying that it does not arise upon Non cepit. As to the other point, we will take time for consideration.

Cur. adv. vult.

Lord CAMPBELL C. J., in this term (*January 27th*), delivered the judgment of the Court.

This was an action of replevin for unlawfully taking and detaining a horse of the plaintiff, which had been taken by the defendants under a claim of property by the defendant *Leather*, who alleged that the horse had been stolen from him. The defendant *Clough* had acted in the transaction only as a constable. Upon the trial, a verdict was found for the plaintiff, with liberty for the defendant *Clough* to move to enter the verdict for him if the Court should be of opinion that he was entitled, under the plea of Non cepit, to give in evidence his justification as a constable. It was also contended for

(a) 1 *Br. & B.* 57.

(b) *Willes*, 668. 672.

all the defendants that the action of replevin would not lie in such a case.

The defendant *Clough* was one of the constables of the borough of *Liverpool*, appointed under sect. 76 of stat. 5 & 6 W. 4. c. 76.; which provides that the men sworn as such constables shall, not only within the borough, but also within the county in which the borough or any part is situate, and in any county within seven miles of the borough, "have all such powers and privileges, and be liable to all such duties and responsibilities, as any constable duly appointed now has or hereafter may have within his constablewick by virtue of the common law of this realm, or of any statutes made or to be made, and shall obey all such lawful commands as they may from time to time receive from any of the justices of the peace having jurisdiction within such borough, or within any county in which they shall be called on to act as constables;" and, by sect. 133 of the same Act, it is provided, "for the protection of persons acting in the execution of this act," "that all actions and prosecutions to be commenced against any person for any thing done in pursuance of this Act shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise," and after one month's notice before the commencement of the suit: "and in any such action the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon."

The actual taking of the horse, which was the fact committed by the defendants, was beyond the limits of the borough of *Liverpool*, but within the county within which the borough was situate: and there was no question

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but that the defendant *Clough* would be justified as a constable in what he did, provided he was entitled to give the special matter in evidence under the plea of Non cepit, which was the only plea he pleaded. In replevin Non cepit is the general issue: but the privilege given by stat. 7 *Ja.* 1. c. 5. and stat. 21 *Ja.* 1. c. 12. s. 5. to constables, to plead the general issue and give the special matter in evidence, is limited to actions upon the case, trespass, battery or false imprisonment; and neither of those statutes applies to the present case. But it was contended, for the defendant *Clough*, that he was entitled, by sect. 133 of stat. 5 & 6 *W.* 4. c. 76., to give the special matter in evidence, under the plea of Non cepit in replevin, as he was, at the time of the fact committed, a constable acting in the execution of that Act, and that what he did was in pursuance of it. The only authority under which the defendant *Clough* acted as a constable was that given by stat. 5 & 6 *W.* 4. c. 76. s. 76.: whatever power, privilege or responsibility he had were wholly under that Act. It appears to us that, when he was acting as a constable in this particular case, he was acting in pursuance of the power given to him by that statute, and that he is entitled to the protection given by sect. 133 to all "persons acting in the execution of this Act." The case of *Hazeldine v. Grove* (a) is a direct authority in the defendant's favour, and in principle is not distinguishable from this. It is also to be observed that the terms of sect. 76 of 5 & 6 *W.* 4. c. 76., when speaking of the powers and privileges given to the constables appointed under the Act, are very comprehensive, being "all such powers and privileges" "as any constable

(a) 3 Q. B. 997.

duly appointed now has or hereafter may have within his constablewick, by virtue of the common law of this realm, *or of any statutes made or to be made:*" which would, in terms, entitle the defendant *Clough* to the privileges given by the 133d section of the Act. The case of *Shatwell v. Hall (a)*, which was the only case much relied upon for the plaintiff, is distinguishable from the present in its circumstances. In that case, by the local Act, the assistant constables appointed under it for the town of *Staleybridge* were also to execute all such warrants and orders as the justices of the peace for the counties of *Lancaster* and *Chester*, or either of them, should direct to them to be executed within the town. The local Act also contained a provision that no plaintiff should recover in any action against any person for any thing done in pursuance of that act, unless twenty one days' notice in writing was previously given. Two of the defendants had been appointed assistant constables for *Staleybridge* under the local Act, and had been directed, by the warrant of a justice of the counties of *Chester* and *Lancaster*, to assist the landlord of a house in *Staleybridge* in breaking open a house there, in order to seize goods, under the authority given by the stat. 11 G. 2. c. 19. s. 7., that had been fraudulently removed to prevent a distress for rent. The Court were of opinion that the action was not brought for any thing done in pursuance of the local Act, though the defendants were appointed constables by virtue of that Act. That which the defendants in that case did was rather in pursuance of stat. 11 G. 2. c. 19. s. 7., than of the

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local Act: but the privileges given by stat. 5 & 6 W. 4. c. 76. s. 76. to constables appointed under that Act are much larger than those which could be claimed by the constables appointed under the Act for the town of *Staleybridge*. By the former Act they are entitled to all the privileges which any constable then had or thereafter might have by the common law or by any statute then made or thereafter to be made, terms sufficiently comprehensive to give the defendant *Clough* the benefit of the provisions of the Municipal Corporation Act or of any other Act for the protection of constables. If it should be found difficult to reconcile the judgment of the Court of Exchequer in *Shatwell v. Hall* (a) with that of the Court of Queen's Bench in *Hazeldine v. Grove* (b), we may observe that the judgment of the Court of Exchequer was given upon refusing a rule when only one side had been heard, whilst the judgment of the Court of Queen's Bench was given after full argument by the counsel on both sides, and is besides posterior in point of date.

Upon the whole, we are of opinion that the defendant *Clough* was entitled to the privileges given by sect. 133 of stat. 5 & 6 W. 4. c. 76., and that the verdict should be entered for him.

With respect to the question whether replevin could be maintained in such a case, we are of opinion, upon the authority, not only of the text books, but of decided cases, that replevin will lie when goods have been unlawfully taken, though not as a distress. It is so distinctly laid down in *Gilbert's Replevin*, 58; *Com.*

(a) 10 M. & W. 523.

(b) 3 Q. B. 997.

Dig. tit. "Replevin" (A); Bul. N. P. 52; and in the cases of George v. Chambers (a) and Shannon v. Shannon (b) (in Ireland). We therefore think that replevin, though an unusual form of action in such a case as the present, is nevertheless maintainable.

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The rule will be absolute to enter a verdict for the defendant *Clough*.

Rule absolute accordingly.

(a) 11 *M. & W.* 149.

(b) 1 *Sch. & Lef.* 324.

END OF HILARY TERM.

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CASES

ARGUED AND DETERMINED

IN

HILARY VACATION,

XVI. VICTORIA (a).

The Judges who sat in banc in this vacation were :

COLERIDGE J.
WIGHTMAN J.

ERLE J.
CROMPTON J.

Friday,
February 4th.

CHARLES MOUNTNOY Appellant *against* WILLIAM
COLLIER Respondent.

A plaintiff was brought in a county court for use and occupation. It appeared that plaintiff demised the

APPEAL from the County Court of *Staffordshire* holden at *Uttoxeter*, in the matter of a plaintiff of *Mountnoy* against *Collier*. The following was the case stated by the Judge of the County Court.

premises to defendant for a year from *Michaelmas* 1850 and defendant occupied from that date up to the time of the trial. Defendant paid the rent to plaintiff, for the half year up to *Lady* day 1851, but refused to pay rent afterwards. It was proved that *J.*, claiming to be plaintiff's landlord, had given plaintiff notice to quit, expiring at *Lady* day 1851, and ordered the defendant not to pay plaintiff rent after that day; and that plaintiff and *C.*, a deceased occupant of the premises in question, had paid 10*s.* rent to *J.* Plaintiff contended that this payment was for a part only of the premises; defendant, that it was for the whole. Defendant offered to prove by declarations of *C.*, the deceased tenant, that *C.* paid the rent for the whole. The Judge rejected the evidence; but gave judgment for defendant, on the ground that plaintiff's title had expired as to part, and that the rent was not apportionable. On appeal on a case stating the above facts:

Held: that the judgment could not be supported: that the evidence ought to have been received; and that, if, when received, it shewed that the defence was *bonà fide*, it would sufficiently raise a question of title to deprive the county court of jurisdiction under stat. 9 & 10 *Vict. c. 95. s. 58.*

Quære, whether in an action for use and occupation it is a defence that the plaintiff's title expired after the demise, and before the period for which he claims, if there has been no eviction or surrender of possession by defendant? *Seemle*: that it is a defence; at least if there is a claim on the tenant by the person entitled to the mesne profits from the expiration of plaintiff's title, and submission on the tenant's part.

(a) The Court sat in banc on the 4th and 5th of *February*.

This was an action brought in the County Court of *Staffordshire* holden at *Uttoxeter*, and heard before me, as Judge of that Court, without a jury, on the 20th *November* last. The action was to recover the sum of 32*l.* 10*s.* for a year's rent of a messuage and lands called the *Shoulder of Mutton*, situate at *Hoarcross* within the jurisdiction of the above Court, due at *Lady* day 1852: and, after the service of a summons, the defendant paid the sum of 14*l.* 2*s.* 5*d.* into Court. It was proved on the trial that, shortly before *Michaelmas* day 1850, the plaintiff let to the defendant the premises, consisting of a house and garden land and outbuildings, at the rent of 32*l.* 10*s.* per annum: and in pursuance of such letting the defendant paid to the plaintiff the first half year's rent (*viz.*) 16*l.* 5*s.* when it became due, on *Lady* day 1851, and continued in the occupation of the premises up to the time of the trial, and still continues in such occupation, but had paid no further rent to the plaintiffs. It was proved that the father in law of the plaintiff, named *John Cotton*, had been in the possession of these premises up to the time of his death, and that, upon his death, the plaintiff took possession thereof. It was shewn, by a notice to quit other and distinct premises, which the plaintiff and his wife had served, that they described themselves as executor and executrix of the said *John Cotton*; but no probate or other evidence of the will of *John Cotton* was produced at the trial. It was proved that the said *John Cotton* had rented other and distinct premises from one *Ingram*, for which he paid rent, and that he also paid a sum of 1*s.* as for a sill of land; but what that sill of land was, or where situate, there was no satisfactory evidence adduced; that sum of 1*s.* had been increased in *John Cotton's* lifetime to 10*s.*;

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and which sum of 10s. was also paid by the plaintiff, after *Cotton's* death, as the plaintiff alleged, for what he termed an encroachment, which had been made by reason of the said house called the *Shoulder of Mutton* having been enlarged about the year 1830, when a part of the said house and a cellar were extended and built upon such encroachment or land belonging to the said *Ingram*. *Ingram*, in right of such payment, set up a claim to the *Shoulder of Mutton* and the rest of the premises, and gave notice to the defendant not to pay any more rent to the plaintiff; and thereupon the defendant refused to pay rent to the plaintiff: and the said *Ingram*, previously to *Michaelmas* 1850, served a notice to quit upon the plaintiff in the terms following. "To Mr. *Charles Mountnoy* and Mrs. *Anne Mountnoy*, Executor and Executrix of the late Mr. *John Cotton*. I hereby give you notice to quit and deliver up on the 25th day of *March* next, or at such other time as your current year therein shall expire, the peaceable possession of all and every the messuage called the *Shoulder of Mutton* and cottage *Raven's Nest*, with buildings, lands and appurtenances thereunto belonging, situate at *Hoarcross* in the parishes of *Yovall* and *Newborough* and elsewhere in the county of *Stafford*, which you now rent or hold of *H. C. M. Ingram Esq.*" The *Raven's Nest* was accordingly given up: but plaintiff retained the *Shoulder of Mutton*, and let it as aforesaid to the defendant. Evidence was proposed to be given of declarations made by the late *John Cotton* as to what the payment of 10s. had been for: but I rejected such evidence, in the absence of further proof connecting *John Cotton* with the plaintiff. It was also contended, on the part of the defendant, that the setting up of such a claim by the said *Ingram*,

and the recognition of such claim by the defendant, brought the title to the said premises in question, so as to exclude the jurisdiction of the County Court; but I held that, as between the plaintiff who had so expressly let, and the defendant who had expressly taken, the premises, such title did not come in question: but I gave judgment for the defendant upon the ground that, this being an entire rent reserved and issuing from the whole of the premises let by the plaintiff to the defendant, and the notice to quit having determined the plaintiff's tenancy of that part of the premises in respect of which he had paid the rent of 10*s.*, viz. the part upon which the enlargement of the *Shoulder of Mutton* had been built, the defendant had proved to me the determination of the plaintiff's title to that part, and that I could not apportion the rent in respect of the remainder.

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The questions for the opinion of the Court are:

1st. Whether I was right in so holding that under such circumstances I could not sever or apportion such rent? and, if the Court shall hold that I was wrong, then will arise:

2dly. Whether the title to a corporeal hereditament came into question so as to exclude my jurisdiction? and

3dly. Whether I ought to have received in evidence the declarations of the late *John Cotton*, the former tenant of part of the premises?

The parties having differed as to the stating of this case, I have settled the above statement for the consideration of the Court above.

Badeley, for the appellant (plaintiff below). The Judge decides the case on the ground that the notice to quit given by *Ingram* had determined the plaintiff's title

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as to part of the premises let by him to the defendant; and that therefore, though the defendant continued, in fact, to enjoy the whole of the premises, he is to pay nothing for their use. The evidence does not justify the conclusion that the plaintiff's title to any part of the premises had expired: but, supposing that it had expired, still, as there is no eviction or giving up of possession by the defendant, he is estopped from disputing his landlord's title; *Balls v. Westwood* (a). Even if there had been an eviction from part by title paramount, the sum claimable for use and occupation would be apportionable. (He was then stopped by the Court.)

J. Gray, contra. The Judge has stated this case so as to make it depend on a point which it must be owned is untenable; for certainly, if *Ingram* had a paramount title to part only of the premises, the claim would be apportionable (b). But the points, upon which the defendant relies, may be sufficiently collected from the case. The plaintiff let the premises to the defendant at a yearly rent: then *Ingram*, who claims to be owner of the premises, gives the plaintiff notice to quit, which, according to the defendant's case, terminated the plaintiff's title at Lady day 1851. The defendant paid rent up to the day on which, if *Ingram*'s claim is well founded, the plaintiff's title expired. From that day the defendant occupied by the sufferance of *Ingram*, who might have ejected him and recovered the rent as mesne profits; and *Ingram* has made the claim on him. Then, to prove that *Ingram*'s claim is well founded, the defendant offers in evidence the declarations of the deceased tenant in possession, *John Cotton*, to shew that he held

(a) 2 Camp. 11.

(b) See note (f) to *Salmon v. Smith*, 1 Wms. Saund. 204 a. (6th ed.).

these premises as tenant to *Ingram*. Had this evidence been admitted and proved that fact, the defendant would have had a defence on the merits: and, moreover, it would have appeared that the Judge of the County Court had no jurisdiction, by stat. 9 & 10 *Vict. c. 95. s. 58.*, as the whole question would have been whether the plaintiff or *Ingram* had the title to the premises. [*Erle J.* That depends on whether the law would permit the defendant to dispute the plaintiff's title. It now seems to come to a question of law. If *A.* having a defeasible title lets to *B.* for a year, and *B.* enters and actually enjoys for the whole year, can *B.*, not having given up actual possession, shew that his landlord's defeasible title was defeated before the end of the year, and use that as a defence in an action for use and occupation for the subsequent period?] He may do so. *Balls v. Westwood* (a) does not state the law accurately. A tenant is estopped from asserting that the landlord who let him into possession had no title; but he is at liberty to shew that the landlord had a title which has since expired; *England dem. Syburne v. Slade* (b), *Doe dem. Jackson v. Ramsbotham* (c), *Gravenor v. Woodhouse* (d), Note (c) to *Walton v. Waterhouse* (e), *Com. Dig. Estoppel* (E 8.). And, if the tenant may shew this in an action in ejectment where the possession of the land is claimed, it seems, a fortiori, that he should be permitted to do so in an action claiming the rent. Suppose the plaintiff had assigned the reversion to *Ingram*: in that case the defendant plainly might set up the assignment as a defence; otherwise he would be obliged to

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(a) 2 *Camp.* 11.(b) 4 *T. R.* 682.(c) 3 *M. & S.* 516.(d) 1 *Bing.* 38.(e) 2 *Wms. Saund.* 418 a. (6th ed.).

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pay the rent twice. As it is, *Ingram* gives notice to the defendant that he claims the rent: if the plaintiff's title really did expire, the defendant is liable to pay the value to *Ingram*, and will have no defence if the latter sues for mesne profits. Surely it would be very hard if the defendant is not permitted to use this as a defence to an action for the rent.

Badeley, in reply. Had the defendant given up possession he might have raised this defence: but he continues actually to enjoy under the plaintiff's demise, and therefore cannot dispute his title.

COLERIDGE J. Mr. *Gray* is obliged to admit that the judgment given cannot be sustained, and that the case must be sent down again; but he succeeds in shewing that the result will probably depend upon this question, whether the defendant may shew that the plaintiff's title had expired at some time subsequent to the original taking, though in fact he has enjoyed the possession to the end of the term originally granted to him by the plaintiff, who let him into possession. It is clear that, in some cases, a tenant, though he may not shew that the landlord had no title at the time he made the demise, may shew that the title, which the landlord then had, has subsequently expired, or been defeated. I think it would be hard upon a tenant if, in order to enable him to do this, he was obliged in all cases actually to go out of possession; and that, if there is a new arrangement with the person who really has the title to hold under him, it should be equivalent to going out of possession. The point arises in the present case on the second and third questions put to us. The facts

seem to be that *Cotton*, who is since dead, occupied the *Shoulder of Mutton*, and also other premises, called the *Raven's Nest*. The plaintiff came into possession, on *Cotton's* death, apparently, from his own statement, claiming as *Cotton's* personal representative: and he let the *Shoulder of Mutton* to the defendant at a yearly rent. Almost at the same time *Ingram* gave the plaintiff notice to quit both the *Raven's Nest* and the *Shoulder of Mutton*. It is not disputed that the *Raven's Nest* was held from *Ingram*: but *Cotton*, during his life, and the plaintiff afterwards, paid a sum of 10*s.* to *Ingram* for something, different from the *Raven's Nest*: according to the plaintiff's case, it was for a part of the *Shoulder of Mutton* only. On the expiration of the notice to quit, the plaintiff gave up the possession of the *Raven's Nest*. What has passed between *Ingram* and the defendant is stated thus. "*Ingram*, in right of such payment, set up a claim to the *Shoulder of Mutton* and the rest of the premises, and gave notice to the defendant not to pay any more rent to the plaintiff; and thereupon the defendant refused to pay rent to the plaintiff:" but it appears that he had paid the plaintiff rent up to *Lady* day, when, if *Ingram's* notice to quit was good, the plaintiff's title expired. Now, the Judge has found the effect of the notice to quit to be to determine the plaintiff's title to that for which the 10*s.* was paid: the plaintiff says that was only part of the *Shoulder of Mutton*; the defendant says it was the whole; and he proposes to supply the deficiency of proof, as to what the 10*s.* was paid for, by giving evidence of the declarations of *Cotton*, which, he says, will shew he paid it for the whole. Now, in general, the declarations of a deceased tenant are admissible to shew under whom he held: and cer-

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tainly I can see no reason why they should not be admitted here. Then, if they are admitted, and prove what is expected, the question will rise, whether, if a tenant from year to year sublets, and sues the subtenant for use and occupation, it is competent for the subtenant to shew, as a defence, that, before the period of occupation for which he is sued, the mesne tenant's interest had determined, and that the head landlord claims from him the rent for that period. I do not think it is necessary, for the purpose of constituting such a defence, that the subtenant should actually have given up the possession, or that the head landlord should actually have evicted him, if there has been a claim and a new arrangement equivalent to an eviction and fresh taking. All that it is necessary to decide in this case is, that the Judge ought to have received this evidence, on which a question might rise as to the title between the plaintiff and *Ingram*: and, as soon as the Judge is satisfied that the question of title is *bonâ fide* raised, he should stop the cause and go no further.

WIGHTMAN J. It is conceded that the judgment of the county court cannot be supported: but the important question is, whether the title comes in question: for, if it does, the Judge has no jurisdiction, and it is useless to proceed before him. Now, it is not very clear, on the case, what the facts really were: but there is enough to shew that both the plaintiff and the defendant meant to dispute a question of title, namely, whether the whole, or only a part, of the *Shoulder of Mutton* belonged to *Ingram*: and the question is, whether the defendant is at liberty in this action to set up that his landlord's title had expired; for, if he was at liberty to do so, the title did

come in question. It seems to me that, under the circumstances, the title came in question. Part of the *Shoulder of Mutton*, at least, it is admitted, was built on *Ingram's* land; and 10s. a year was paid to *Ingram*, for something which was held from him; whether for that part alone, or for the whole, is not clear. The plaintiff says that it was for that part of the *Shoulder of Mutton* which he calls an encroachment, and that part alone which was held from *Ingram*. The defendant says that the whole was held from *Ingram*; and *Ingram* has claimed the whole. It was proposed to prove by declarations of the deceased occupant *Cotton* that he held the whole from *Ingram*. *Cotton* was not a mere stranger: he occupied the premises; he paid the 10s. rent; and the plaintiff, when he came into occupation, paid the same 10s. rent. Now, under such circumstances, *Cotton's* declarations ought to have been admitted. What his declarations when admitted may prove we do not know. It will be for the Judge to say whether they shew that there is a *bonâ fide* raising of a question of title on the part of the defendant. As the case stands, it seems to me that there is such a *bonâ fide* raising of the question of title.

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ERLE J. This is an action for use and occupation: and the plaintiff has proved a demise by him, and an occupation by the defendant. The proposed defence is, that the plaintiff's title has expired since the demise and before the period for which the rent is claimed. And the main question is whether the defendant may shew that as a defence, he not having given up possession. I think it is competent for him to do so. *Balls v. Westwood* (a)

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is an authority to the contrary: but there are numerous authorities to shew that a tenant is not estopped from shewing that his landlord's title has expired. And justice requires that he should be permitted to do so: for a tenant is liable to the person who has the real title, and may be forced to pay him, either in an action for use and occupation, if there has been a fresh demise or an arrangement equivalent to one, or in trespass for the mesne profits. It would be unjust if, being so liable, he could not shew that as a defence; but there are abundant authorities that a tenant may shew that his landlord's title has expired. That is the governing principle for the decision of this case. It will be for the Judge, on the evidence, to determine whether there is a bonâ fide defence on this ground, or whether it is merely colourable. If it is a bonâ fide defence title came in question. *Cotton's* declarations were admissible before any tribunal; for, as he was a deceased occupant, his declarations, going to cut down his primâ facie title, were admissible on that ground. Further, in the present case, it appears that the plaintiff claims as *Cotton's* executor, and under him. Then, if, when received, these declarations shew that the question of title bonâ fide arises, the jurisdiction ceases.

CROMPTON J. The case must go down again; and the declarations must be received: but it is desirable that we should express our opinion whether the title so arises that the Judge should stop the case. That mainly depends on the question whether the proposed defence can be raised. I believe it has never been expressly decided whether the expiration of the landlord's title as to part of the premises is a defence pro

tanto to an action for the use and occupation, when the tenant has actually enjoyed the whole premises for the whole of the period in question, or whether, in order to make it a defence, there must be an eviction or giving up of possession shewn. On principle it would seem a defence, where, in consequence of the expiration of the title, the defendant is liable to another for the mesne profits of the part in question, and that other claims them. But it is not necessary to decide that; for there seems in this case to be sufficient probable ground for the defence to make the title come in question: and, if the evidence is such as may be expected, so that the question whether *Ingram* or the plaintiff has the title to these premises appears bonâ fide to be raised, the Judge should stop the cause.

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Badeley claimed the costs, as the judgment appealed against was not confirmed.

Per CURLIAM. It is the general rule that when the judgment is not confirmed the appellant gets costs: but it is not inflexible. We have made several exceptions already.

Judgment set aside without costs.

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Friday,
February 4th.

The QUEEN *against* the Inhabitants of ST. GILES,
CAMBERWELL.

On the trial of an appeal at sessions, a witness proved the contents of a lost deed, and its execution by the parties. He stated, on cross examination, that the name of *B.* was written opposite to the names of the parties; that he knew *B.*, who was dead; but that witness did not know *B.*'s handwriting. The Sessions found that *B.* was the attesting witness, and, because there was no evidence of his handwriting, rejected the secondary evidence. On a case stating the above facts: Held: that, the Sessions having found as a fact the identity of the attesting witness and the deceased man, further evidence of handwriting was not required.

ON appeal against an order of two justices, dated 20th November A. D. 1851, for the removal of *Jane White*, the wife of *William White*, from the parish of *Camberwell* in *Surrey* to the parish of *Nuneaton* in *Warwickshire*, the Sessions quashed the order, subject to the following case.

The ground of removal was the alleged settlement of the pauper in *Nuneaton*, by the apprenticeship of the said *William White* to *Henry Webb*, late of *Nuneaton*, a plumber and glazier, deceased. At the hearing of the said appeal, the indenture of apprenticeship was not produced; but *Robert Webb*, a son of the said *Henry Webb*, was called to prove the deed, and its destruction by his father. He stated that he saw the deed in 1827; that it was an indenture; and that opposite to the seals were the names of his said father and of the said *William White* in their respective hands writing. In answer to questions, put by counsel for the appellant parish, as to the execution of the alleged indenture, he said that the instrument bore also the name of one *Buchanan*; that that name was written on the side of the indenture opposite to the signature of *Henry Webb* and *William White*; that he did not know what was meant by "attesting witness," but believed the signature in question to be a lawyer's signature; that one *Buchanan* had been a lawyer at *Nuneaton*, but he had heard he was now

dead; and that witness did not know the handwriting of the said *Buchanan*. It was objected, by the counsel for the appellant parish, that secondary evidence of the contents of the indenture of apprenticeship was not admissible, as proof had not been given of the alleged attesting witness's handwriting. The Court overruled the objection, on the ground that it had not been proved that there had been an attesting witness. The witness thereupon gave parol evidence of the contents of the indenture; which was an indenture whereby the said *William White* was apprenticed to the said *Henry Webb*: and he also proved residence and service in *Nuneaton* under the said indenture. The witness, upon general cross-examination, stated that he believed that *Buchanan* was attesting witness to the indenture; that witness was sure *Buchanan* was attesting witness. Upon reexamination, he stated that his reason, for believing and feeling sure that *Buchanan* was attesting witness, was that *Buchanan* had always transacted legal business for his father; that witness was not present when the deed was executed. The counsel for the appellant parish hereupon called the attention of the Court to the objection made: and the Court, being of opinion that *Buchanan* was the attesting witness to the deed, decided in their favour; and, there being no other evidence as to the deed, quashed the order, but, at the request of the respondent parish, subject to the opinion of this Court.

If this Court shall be of opinion that secondary evidence of the contents of the said indenture of apprenticeship was rightly rejected, the order of Sessions is to be confirmed and the order of removal is to stand quashed. But, if this Court shall be of opinion

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Joyce, in support of the order of Sessions. When an attested instrument is not destroyed, the ordinary mode of proof is to call the attesting witness; or, if he be dead, to prove his handwriting. If the deed is destroyed, and the attesting witness is alive, he *must* be called; *Gillies v. Smither (a)*. It seems to follow, that if he be dead his handwriting must be proved.

Bovill and *Maxwell*, *contra*. In *Gillies v. Smither (a)* the witness was alive. The present case is more like *Keeling v. Ball (b)*, in which it was held that the contents of a lost deed might be proved, though there were subscribing witnesses, those witnesses being unknown. Though proof of the handwriting of an attesting witness who is dead is a method of proving a deed, it has never been decided to be the only mode of proof, even when the deed is not lost. [*Crompton J.* Surely the general rule is that, if the attesting witness be dead, the proof of his handwriting is the proper and necessary proof of the execution of the deed.] It has not ever been decided to be indispensable to prove the deceased witness's writing: and in *America* it has been decided that in such a case proof of the handwriting of the party is sufficient, if the absence of the witness is accounted for; 2 *Taylor on Evidence*. sect. 1336. p. 1210.

WIGHTMAN J. (c). I think that our decision on the

(a) 2 *Stark. N. P. C.* 528.

(b) *Pea. Ev. App.* xxxii.

(c) *Coleridge J.* had gone to Chambers.

case now stated for us will not touch any other case. It is not necessary to determine whether proof of the handwriting of a deceased attesting witness to a lost instrument is indispensable; for in this case the very evidence raising the objection also removes it. The Sessions on the evidence before them find that *Buchanan* was the attesting witness; they have therefore found as a fact the identity of the man *Buchanan*, who is shewn to be dead, and the attesting witness *Buchanan*. The proof of handwriting can be required for no object except to establish that identity between the dead man and the witness, which in this case is found as a fact. The respondents went further, and proved the handwriting of the parties; but without that, on this finding, that the deceased man was the attesting witness to the deed, there was enough to admit secondary evidence of its contents.

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ERLE J. I am of the same opinion, and on the same reasons as my brother *Wightman*, which in my opinion go the full length of establishing the principle, that in no case whatever where the instrument is lost, and the attesting witness is dead, can it be necessary to prove his handwriting. For, if the evidence establishes that there is a subscribing witness, and that he is the same person who is proved to be dead, the case is brought within the rule laid down by my brother *Wightman*: if the evidence does not establish the identity between the subscribing witness and the dead man, it is a case of an attesting witness unknown, and falls within a different rule (a). And on general grounds I think it would be

(a) See *Keeling v. Ball, Pea. Ev. App.* xxxii.

1853. injurious if we were to decide that, when there was evidence of the contents of a lost instrument, and that it was executed by the parties, the evidence was to be rejected, because there was no proof of the handwriting of a deceased subscribing witness. Such a decision would be contrary to the tendency of all modern decisions, which has been to admit evidence.

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CROMPTON J. I wish to be understood to give my judgment only on the particular circumstances of this case. It may very well happen, in other cases, that the facts may be such as to shew that the party seeking to prove the destroyed deed might have it in his power to produce evidence of who the attesting witness was, and to prove his handwriting if he is dead; and, in a case where he took no steps to do this, I think the decision might be different from the present. Therefore, without giving any opinion on the general rule, I confine my decision to saying the evidence was admissible in this particular case, and under these special circumstances. I agree with my brother *Erle* that justice and common sense are in favour of admitting such evidence.

Order of Sessions quashed.

The QUEEN against WILLIAM WAGHORN.

HORN, in *Michaelmas* term 1852, obtained a rule to quash a conviction brought up into this Court by certiorari. The conviction was by five justices of *Kent*, in petty sessions for the Upper South Division of the Lathe of *Aylesford* in that county, of *William Waghorn* for, at the Borough of *Maidstone*, unlawfully making use of, to the supervisor of Excise, a certificate in writing signed by one of the overseers of the parish of *Nettlestead* within that petty sessional division, relative to the annual value at which certain premises occupied by the defendant in that parish were rated, for the purpose of obtaining a licence for himself to retail beer on the premises, by which he did obtain the licence, knowing a matter in the certificate to be false. The ground of the motion was that the certificate was used at *Maidstone*, which is not within the jurisdiction of the justices of *Kent*; and that the justices of the Borough of *Maidstone* had the jurisdiction to adjudicate on the offence.

In *Hilary* term last (*January* 19th (a)), *Archbold* shewed cause and *Horn* was heard in support of his rule. The question depended on the construction of the following enactments.

Justices for a petty sessional division of the county of *K.* convicted *W.* under the Beer Acts (11 *G.* 4 & 1 *W.* 4. c. 64., 4 & 5 *W.* 4. c. 85., and 3 & 4 *Vict.* c. 61.) for knowingly using at the borough of *M.* (which is out of the general jurisdiction of the justices of *K.*) a false certificate relative to the rating of a house, within the petty sessional division, occupied by the defendant, for the purpose of obtaining a licence for himself to retail beer on the premises. The conviction being brought up by certiorari :
Held by Lord Campbell C. J., *Wightman* J. and *Crompton* J.

(*Coleridge* J. dissentiente) that the jurisdiction to adjudicate on this offence was not given, by the Beer Acts, to the justices within whose jurisdiction the house to which the licence was intended to be applied was, but remained with the justices within whose jurisdiction the offence was committed. Conviction quashed.

(a) Before Lord Campbell C. J., *Coleridge*, *Wightman* and *Crompton* Js.

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Stat. 11 *G.* 4 & 1 *W.* 4. c. 64. provides for the granting of licenses to retail beer. Sect. 15 enacts: "that all penalties under this Act, save and except the penalty hereinbefore mentioned for selling beer by any person not duly licensed, shall and may be recovered upon the information of any person whomsoever before two justices acting in petty sessions; and that every such penalty shall be prosecuted and proceeded for within three calendar months next after the commission of the offence in respect of which such penalty shall be incurred; and every person licensed under this Act who shall be convicted, before two justices so acting in and for the division or place in which shall be situate the house kept or theretofore kept by such person, of any offence against the tenor of the licence to him granted under this Act, or of any offence for which any penalty is imposed by this Act, shall, unless proof be adduced to the satisfaction of such justices that such person had been theretofore convicted before two justices within the space of twelve calendar months next preceding of some offence against the tenor of his licence or against this Act, be adjudged by such justices to be guilty of a first offence against the provisions of this Act, and to forfeit and pay any penalty by this Act imposed for such offence, or if no specific penalty be imposed for such offence, then any sum not exceeding five pounds, together with the costs of the conviction; and if proof shall be adduced to the satisfaction of such justices that such person had been previously convicted before two justices within the space of twelve calendar months next preceding of one such offence only, such person shall be adjudged by such justices to be guilty of a second offence against the pro-

visions of this Act, and to forfeit and pay any penalty by this Act imposed for such offence, or if no specific penalty be so imposed, then any sum not exceeding ten pounds, together with the costs of the conviction; and if proof shall be adduced to the satisfaction of such justices that such person had been previously convicted before two justices within the space of the eighteen calendar months next preceding of two such separate offences, and if proof shall be adduced to the satisfaction of the justices that such person so charged is guilty of the offence charged against him, such person shall be adjudged to be guilty of a third offence against the provisions of this Act, and to forfeit and pay any penalty imposed by this Act in respect of such offence, or if no specific penalty shall be imposed, then to forfeit and pay the sum of fifty pounds, together with the costs of the conviction."

Stat. 4 & 5 W. 4. c. 85. recites stat. 11 G. 4 & 1 W. 4. c. 64.; and, by sect. 2, requires that all persons applying for a licence shall deposit with the Commissioners of Excise a certificate of good character. Sect. 8 enacts that any person certifying any matter as true, knowing it to be false, or making use of a certificate, knowing any matter therein to be false, "shall, on conviction of such offence before two or more justices of the peace, forfeit and pay the sum of twenty pounds." Sect. 11 enacts that "all the powers, regulations, proceedings, forms, penalties, forfeitures, and provisions contained in the said recited Act with reference to persons licenced under the said Act, and to the offences committed by such persons against the said Act, or against the tenor of any licence granted under the said Act, and also with reference to the sureties of such persons, and to persons doing the things thereby prohibited without the licence required by the said Act,

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shall (except where they are altered by this Act or repugnant thereto) be deemed and taken to be applicable to all persons licenced under this Act, and to all offences committed by such persons of the same description as the offences mentioned in the said Act, and to the sureties of all such persons in respect of such offences, and to all persons doing, without the licence required by this Act, things of the same description as the things prohibited without the licence required by the said Act, as fully and effectually as if all the said powers, regulations, proceedings, forms, penalties, forfeitures, and provisions had been repeated and reenacted in this Act with reference to persons licenced under this Act, and to the sureties of such persons, and to persons acting without the licence required by this Act; and also that all the powers, regulations, and provisions in the said Act contained, authorizing any party convicted to appeal to the General Session or Quarter Sessions of the peace against any conviction under the said Act, shall also extend and apply to any convictions under this Act."

Stat. 3 & 4 *Vict. c. 61.* recites the two Acts above mentioned; and, by sect. 2, enacts "that every person who shall apply to be licenced to retail beer or cider shall produce to the proper officer of Excise authorized to grant such licences a certificate in writing from an overseer of the township, parish, or place in which he shall reside, certifying that such applicant is the real resident, holder, and occupier of the said house, and also certifying the true rent or annual value at which such house, with the premises occupied therewith, is rated in one rating to the poor rates, according to the last sum or rate made and allowed in such township, parish, or place for the relief of the poor; and every such certificate shall be

deposited and left with the proper officer of Excise by whom such licence shall be granted; and a duplicate thereof shall be deposited and left with the clerk of the peace for the county, riding, or city within which such township, parish, or place is situate." Sect. 6 enacts: "that every person who shall, for the purpose of obtaining for himself or enabling any other person to obtain a licence to retail beer or cider, forge or counterfeit any certificate, or shall produce or make use of any certificate, knowing the same to be forged or counterfeit, or the matters certified therein or any of them to be false, shall forfeit fifty pounds." Sect. 19 enacts: "that all penalties and forfeitures by this Act imposed, except where otherwise specially directed, shall be sued for, recovered, mitigated, and applied in the same manner and by the same means as the penalties imposed by the said recited Acts of the first and fourth and fifth years of the reign of his late Majesty King *William* the fourth, are directed to be sued for, recovered, mitigated, and applied; and all the powers, provisions, authorities, and regulations in the said Acts contained, for the recovery, mitigation, and application of penalties, shall, except where otherwise specially directed, extend to and be put in force, as to penalties imposed by this Act, as fully and effectually as if they were herein repeated and reenacted." Sect. 21 enacts: "that all the powers, regulations, proceedings, forms, penalties, forfeitures, enactments, and provisions contained in the said recited Acts, or in either of them, with reference to persons licenced under either of the said Acts, and to the offences committed by such persons against either of the said Acts, or against the tenor of any licence granted under the said Acts, and also with reference to the sureties of such persons, and to persons doing the things thereby pro-

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hibited without the licence required by the said Acts or either of them, shall (except where they are altered by this Act, or are repugnant thereto,) be deemed and taken to be applicable to all persons licenced under this Act, and to all offences committed by such persons of the same description as the offences mentioned in the said Acts, and to the sureties of all such persons in respect of such offences, and to all persons doing, without the licence required by this Act, things of the same description as the things prohibited without the licence required by the said recited Acts, as fully and effectually as if all the said powers, regulations, proceedings, forms, penalties, forfeitures, enactments, and provisions had been repeated and reenacted in this Act, with reference to persons licensed under this Act, and to the sureties of such persons, and to persons acting without the licence required by this Act; and also that all the powers, regulations, and provisions in the said Acts contained, authorizing any party convicted to appeal to the General Session or Quarter Sessions of the peace against any conviction under the said Acts, shall also extend and apply to any convictions under this Act."

The arguments used sufficiently appear from the opinions of the Judges.

Cur. adv. vult.

In this vacation (*February 5th*), the Court being divided in opinion, separate judgments were delivered.

Lord
Campbell C. J.,
Wightman J.,
and
Crompton J.

CROMPTON J. delivered the opinion of Lord CAMPBELL C. J., WIGHTMAN J. and himself

The defendant in this case was convicted before four justices of the county of *Kent* in Petty Sessions assembled, under stat. 3 & 4 *Vict. c. 61. s. 6.*, for having used a false certificate for the purpose of obtaining a

licence to retail beer in a house situate in the county of *Kent*. The certificate was used and the offence was committed within the Borough of *Maidstone*, where the county justices have no general jurisdiction: and the only question for our decision is, whether by the statutes relating to this offence the jurisdiction is given to the magistrates acting for the division or place where the house is situate for which the licence was sought to be obtained.

It was argued, in support of the conviction, that stat. 3 & 4 *Vict. c. 61.*, by which the offence is created, directs (a) that all penalties and forfeitures by that Act imposed "shall be sued for, recovered, mitigated, and applied in the same manner and by the same means as the penalties imposed" by stats. 11 *G. 4. & 1 W. 4. c. 64.* and 4 & 5 *W. 4. c. 85.* "are directed to be sued for, recovered, mitigated, and applied: and it was contended that the 15th section of stat. 11 *G. 4. & 1 W. 4. c. 64.* vested the jurisdiction in the justices of the division or place where the house as to which the licence is granted is situate; and that, although the new offence created by stat. 3 & 4 *Vict. c. 61.* is not committed within the ordinary jurisdiction of the justices, still they are to deal with it, as the penalties are to be recovered in the same manner as those under the earlier Acts, which are to be recovered before the justices of the division or place where the house is situate. The 15th section of stat. 11 *G. 4. & 1 W. 4. c. 64.* enacts that all penalties under that Act, except certain penalties not affecting the present case, are to be recovered before two justices acting in petty sessions, and that they are to be proceeded for within three calendar months; and, if the

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(a) Sect. 19.

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section had stopped there, the jurisdiction as to such penalties would no doubt have been in justices having general jurisdiction in the place where the offence was committed. The section however proceeds to enact that every person *licenced under that Act*, who should be convicted before two justices, so acting (that is acting in petty sessions) for the division or place *in which shall be situate the house kept or theretofore kept by such person*, of any offence against the tenor of his licence, or of any offence for which *a penalty is imposed* by that Act, should, unless proof was adduced of a previous offence, be adjudged guilty of a first offence, and to forfeit and pay &c.: and provisions then follow as to the adjudication and penalty in case of a second or subsequent offence. Assuming that all penalties recoverable before justices under stat. 11 G. 4. & 1 W. 4. c. 64. and under stat. 4 & 5 W. 4. c. 85. must be recovered before justices of the division or place where the house is situate, it remains to be seen whether the general words of stat. 3 & 4 Vict. c. 61. apply to give the justices of the place where the house for which the licence is intended to be obtained is situate jurisdiction to convict a party who is not licenced, and who may not have any house at all, but who may be a party applying for a licence for another for an offence committed out of the general jurisdiction of the justices. We think it impossible to apply the words of the 15th section of stat. 11 G. 4. & 1 W. 4. c. 64., which give the jurisdiction in the case of licenced persons according to the locality of the licenced house, to the new offence created by stat. 3 & 4 Vict. c. 61., which offence may be committed by a person having neither licence nor house. There may be no house "kept or theretofore kept" by the person offending within that section; and the offender may not be a licenced person.

If the words of stat. 3 & 4 *Vict. c. 61.* are to be construed as meaning that the jurisdiction shall be given according to the enactment of that part of the 15th section of stat. 11 *G. 4. & 1 W. c. 64.* which is applicable to the case of licenced persons, there could be no such jurisdiction in many cases, as for instance the case of a person having neither house nor licence, but using a false certificate to obtain a licence for another. We think that it would be straining the words of the 15th section of stat. 11 *G. 4. & 1 W. 4. c. 64.* to hold that a jurisdiction is given by that enactment in the place where the house is situate for which the licence is sought to be obtained. That enactment seems only to apply to the case of licenced persons keeping or having kept a house: and we think that it must either be held that there is no jurisdiction at all for the recovery of the penalties in question, or else that the later statute must be held as meaning that the penalties shall be recoverable under the earlier part of the 15th section of the earlier Act, before two justices acting in petty sessions: and that the later words of the 15th section, being confined to the case of licenced persons, are inapplicable to the recovery of such penalties. The two justices having jurisdiction under the earlier part of the 15th section would therefore be two justices having jurisdiction in the place where the offence was committed, according to the general rule. Though great difficulties arise in this case from the Legislature making provision for new offences by a general reference to the provisions of former statutes not strictly applicable to the new offences, we think that we shall best give effect to the meaning of both statutes by holding that the penalty in question might be recovered before two justices of the place where the offence was committed, under the

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general words of the earlier part of the 15th section of stat. 11 *G.* 4. & 1 *W.* 4. c. 64.; and we think that, at all events, the justices who made the present conviction, neither having general jurisdiction in the place where the offence was committed, nor having jurisdiction given them by the later words of the 15th section, had no jurisdiction to convict in this case; and consequently that this conviction should be quashed.

Coleridge J.

COLERIDGE J. This was a case of conviction of the defendant, under stat. 3 & 4 *Vict.* c. 61. s. 6., for having made use of a certificate for the purpose of obtaining for himself a licence to retail beer and cider, knowing a certain matter certified therein to be false. The offence was committed at *Maidstone*, and within the borough within which the magistrates of the same have exclusive jurisdiction; but the matter falsely certified related to the annual value of a dwelling house in the parish of *Nettlestead* in the county of *Kent*. The conviction was by magistrates of the county acting in the division within which that parish lies: and the only question discussed before us was whether they had jurisdiction, or whether the jurisdiction was not with the magistrates of the borough. By the 19th section of the Act, all penalties and forfeitures, except where otherwise directed, are to be sued for, recovered, mitigated and applied in the same manner and by the same means as the penalties imposed by stat. 11 *G.* 4. & 1 *W.* 4. c. 64. and stat. 4 & 5 *W.* 4. c. 85. The latter of these two Acts refers us to the former: and the material section in this is the 15th, by which it is enacted that all penalties under it, except that for selling beer by any person *not duly licenced*, shall and may be recovered before two justices acting in Petty Sessions; and that every such penalty

shall be proceeded ~~for~~ within three calendar months next after the commission of the offence; and every *person licenced* under this Act, who shall be convicted before two justices, so acting *in and for the division or place in which shall be situate the house kept or theretofore kept by such person*, of any offence against the tenor of his licence or of any offence for which any penalty is imposed by this Act, shall be liable to penalties as after specified in the section. The excepted penalty for selling beer without a licence is made recoverable under the Excise laws, and may be left out of our present consideration. It was argued for the defendant that, omitting this exception, the section included two classes of offences, the penalties for which were recoverable before magistrates in Petty Sessions: the first general, where the locality of jurisdiction was not mentioned, and therefore it would, according to the general rule, be determined by the place where the offence was committed; the second restricted to the case of a licenced person, charged with any offence against the tenor of his licence, or any offence for which a penalty is imposed by the Act, in which cases the jurisdiction was determined by the division or place in which was situate the house kept or theretofore kept by such person. This argument, however, labours under two difficulties: 1st, that, with the exception specially mentioned of selling beer without a licence, the statute appears to contemplate no penalties as recoverable except from licenced persons; and 2dly, that, if the section be broken in two as suggested, no time is limited within which the penalties recoverable under the second part are to be recovered: so that there seems no ground for the division supposed; and, if there be no such division, then the provisions which determine the locality of jurisdiction

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must apply to all the penalties recoverable before magistrates. Now, although there are no words *directly* enacting that these shall be recovered before justices acting in Petty Sessions in and for the division or place in which the house is or has been kept, yet the language used clearly, though indirectly, enacts that they must be so recovered; and this is a very reasonable provision, easily applicable in the case of licenced persons, because the possession of a licence involves the keeping or having kept a house wherein it is to be or has been exercised. There is nothing inconsistent with this in the earlier part of the section, in which nothing is said as to locality of jurisdiction: that part merely provides that the penalties must be recovered before justices, as opposed to Excise Commissioners, and specifies the requisite number of justices, and the time within which they must be recovered; and then the section proceeds to mention the locality of jurisdiction. I should have therefore no difficulty at all in deciding the place if the present offence were one committed under this Act. The difficulty undoubtedly is in applying a provision, which clearly contemplates offences committed by persons keeping or having kept a house, to a case which will often arise when no house is or has been kept. The offence described in stat. 3 & 4 Vict. c. 61. s. 6. must always be committed for the purpose of obtaining or enabling another to obtain a licence: he who commits it for the purpose of obtaining may have kept no house before but only be about to keep one; he who does it to enable another to obtain one may not even contemplate the keeping a house. If, however, we abandon the directions given by stat. 11 G. 4. & 1 W. 4. c. 64., we have nothing to guide us, that statute giving jurisdiction only to parties within the particular division in which the house

is kept. And it should be observed that the principle on which that statute proceeds does admit of a sufficiently satisfactory application to the present case; for the certificate spoken of must always be one which has reference to a house in which the licence sought for is intended to be used, its occupation, its rent, its rating or its value. Thus in the case before us the false certificate which was produced by the defendant related to the annual value of a house occupied by him in *Nettlestead*, in respect of which he was desirous to obtain a licence. It seems but reasonable that the justices, who would have controul and inspection over him after he should obtain the licence, should also have the jurisdiction to punish an offence committed in order to obtain it.

The case I admit not entirely free from difficulty: but, upon the whole, on the grounds I have stated, my strong impression is that the magistrates who imposed the penalty had jurisdiction, and consequently that their conviction should be affirmed.

Conviction quashed.

HENRY STEPHENSON JOHNSON and ISABELLA, his
Wife, *against* SAMUEL LUCAS.

THE plaintiffs, after stat. 15 & 16 *Vict. c. 76.* came into operation, sued the defendant for money lent by the plaintiff *Isabella* before her marriage: "And also for money found to be due from the defendant to the plain-

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A declaration by husband and wife on an account stated must shew that the accounting was concerning matters in

which the wife had an interest. So held, on demurrer to a declaration coming into effect of stat. 15 & 16 *Vict. c. 76.* posterior to the

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tiffs since their intermarriage on accounts stated between them since the intermarriage of the plaintiffs." Demurrer to the last count. Joinder.

The demurrer was argued in *Hilary* term last (a).

Ogle, in support of the demurrer. The account stated with the husband and wife is, in legal effect, stated with the husband alone; and he ought to have sued alone. Stat. 15 & 16 *Vict. c. 76. s. 40.* may be relied on; but that enactment is applicable only to actions for personal injuries to the wife, not to actions *ex contractu*.

Quain, *contra*. No reliance is placed on stat. 15 & 16 *Vict. c. 76. s. 40.* This was a good count before the statute, and is not made bad by it. Husband and wife may sue jointly on a promissory note made after marriage payable to the wife; *Philliskirk v. Pluckwell* (b). Why not on an account stated with her? A promissory note made payable to the wife, or husband and wife, would itself be evidence of an account stated with the wife in one case and with both in the other. The husband may give his wife an interest in such a cause of action; and does so by suing in their joint names. [*Crompton J.* Can a married woman state an account so as to give a consideration for the promise of the other party?] An infant may state an account; the statement is voidable like any other contract made with an infant; *Williams v. Moor* (c). As regards a married woman, the distinction is between the cases of her being plaintiff and defendant. She cannot state an account so as

(a) 18th January. Before Lord Campbell C. J., Coleridge, Wightman and Crompton Js.

(b) 2 M. & S. 393.

(c) 11 M. & W. 256.

to bind herself; but an account may be stated with her, in which her husband may give her an interest and on which an action may be brought in their joint names. [*Wightman J.* But must it not be shewn that the accounting was concerning debts in which the wife had an interest? *Crompton J.* referred to 1 *Chitty on Pleading* (7th edition) p. 34, where it is said: "Where the wife is joined in the action, in these cases the declaration must distinctly disclose her interest, and shew in what respect she is the meritorious cause of action, and there is no intendment to this effect."] That passage is founded on *Bidgood v. Way* (a). The insufficiency of the report of that case is pointed out by Lord *Ellenborough* in *Ord v. Fenwick* (b), and by *Dampier J.* in *Philliskirk v. Pluckwell* (c). Besides, the declaration there was not on an account stated. In *Brinsley v. Partridge* (d) it was held that the consideration of the debt need not appear, "because by the accounts the debt was confessed good." If there be any consideration in respect of which an account may be stated as described in the declaration, and on which the action may be supported, the Court will presume such a consideration to support the count; *Ord v. Fenwick* (b). Here the consideration may be presumed to be a debt due to the wife *dum sola*, in respect of which husband and wife must join in suing, and in respect of which therefore an account may be stated with both. [Lord *Campbell C. J.* You say that a promissory note payable on demand to husband and wife, on which it is conceded that both may sue jointly, would prove this count.] Yes. Such a note would itself be an account stated with husband

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and wife. [Lord *Campbell* C. J. Rather evidence of an account stated.] If the present count were framed in the old form, it would run: "that the plaintiffs and defendant came to an account of and concerning divers moneys due and owing by the defendant to the plaintiffs and then unpaid; and that upon that account the defendant was found indebted to the plaintiffs in the sum of £ ; and, being so indebted, he, in consideration thereof, promised the plaintiffs to pay them the amount." In the count so expanded the consideration clearly appears to be debts due to the plaintiffs, the husband and wife, in respect of which the account was stated. The modern form of the count on an account stated is merely an abridgment of the old form; it was not intended to change the substance of the count. Even if no more appeared than an express accounting with husband and wife, the wife's interest would be as explicitly averred as in a count on a promissory note to husband and wife, or a bond to husband and wife. In none of these cases does the wife's interest expressly appear. The express contract with her is sufficient. Why should not an express accounting with her be equally good?

Ogle, in reply. *Ord v. Fenwick* (a) was decided on a writ of error after verdict. On demurrer the rule is the other way.

Cur. adv. vult.

COLERIDGE J., in this vacation (*February 5*), delivered the judgment of the Court.

(a) 3 *East*, 104.

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This was a demurrer to a count for money found to be due from the defendant to husband and wife on an account stated between them. Two questions arose: first, whether an account so stated by husband and wife, even if averred to be concerning a debt due to the wife *dum sola*, or for which she had been the meritorious cause of action, would give a right of action to the husband and wife; the wife not being competent to state an account, and the consideration, so far as it consisted of stating the account, not moving from her; the second question was, whether such a count can be good on demurrer without it appearing in the count that the money was due in right of the wife. The case of *Wills v. Nurse* (a) is an authority in favour of an action lying on such an account stated concerning money due in right of the wife. It was there held by the Exchequer Chamber, affirming the decision of this Court, that an agreement to forbear from proceeding on a *cognovit*, given to husband and wife and another in an action by them, was a sufficient consideration for a promise to the husband and wife and the third party; though such agreement to forbear could only be valid as against the husband and the third party; and it was held that the wife's interest in the subject matter made her a sufficient party to the consideration, so as to make the promise to her and her husband and the third party valid. It is not necessary, however, to determine whether that case would apply to a promise on an account stated, because we are of opinion, on the second question, that the count is bad on demurrer for want of averring that the account was stated concerning money due to the wife in her

(a) 1 A. & E. 65, in Exch. Ch., affirming the judgment of K. B. in *Nurse v. Wills*, 4 B. & Ad. 739.

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right, or otherwise shewing her interest in the money.

It was held in *Bidgood v. Way* (a) that a count on a promise to husband and wife for the use and occupation of land was bad after judgment by default, for not shewing the interest of the wife, and that a count for money had and received to the use of the husband and wife was also bad. So in *Serres v. Dodd* (b) a declaration in replevin for taking the goods of the husband and wife was held bad on demurrer for want of the wife's interest appearing. It appears from a note to that case, and from the case of *Bourn v. Mattaire* (c), there cited, that such count would probably be supported after verdict, though not on demurrer. The objection in the case of *Serres v. Dodd* (b) arose, it is true, on special demurrer: but the Court treat it as a case where nothing appeared on the record from which it could be inferred that the wife had any interest, which seems a good ground of general demurrer; and the decision of *Bidgood v. Way* (a), which arose on a writ of error after judgment by default, would apply to a case of general demurrer. We think, therefore, upon the authority of these cases, that the present count cannot be supported, and that the demurrer must be allowed.

Judgment for defendant.

(a) 2 W. Bl. 1236.

(b) 2 N. R. 405.

(c) 1 Selw. N. P. 295 (10th ed.).

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WILLIAM NORTHAM *against* RICHARD HURLEY. *Saturday, February 5th.*

CASE. The first count charged that, before and at the time of committing &c., plaintiff was lawfully possessed of a certain close of meadow land called (to wit) *Fourth Tanner's Meadow*, and defendant was possessed of a certain other close of meadow land adjoining the said close of plaintiff, called (to wit) *Third Tanner's Meadow*; in which last mentioned close there was a stream or watercourse, called and known as *Magelake Brook*, and another stream or watercourse, rising from a spring near the last mentioned close, in a close of land of defendant called the *Second Tanner's Meadow*; and which two streams or watercourses united together in the close called the *Second Tanner's Meadow*, at a certain point there, and, from and after such junction, ran together in one united stream through and along a part of the last mentioned close, and through the said close called the *Third Tanner's Meadow*, in a direction towards the said close of plaintiff: and that "plaintiff, by reason of his possession of the said first mentioned close of meadow land, was entitled to have the use and benefit of the water of the said united stream or watercourse; and the said united stream or watercourse, long before and until the committing" &c., "ran and flowed, and of right ought to have run and flowed, and still of right ought to run and flow, from and out of the said

Where *A.*, being owner of land through which a stream runs down to the land of *B.*, grants by deed to *B.* that the stream shall be in the controul of *B.* and his assigns, and shall flow in a free and uninterrupted course through a channel described in the deed, and afterwards *A.* and *B.* assign, respectively, their land to *X.* and *Z.*, *Y.*, if he divert the water from such channel, though he does not thereby deprive *Z.* of the use of any water, is liable to an action at the suit of *Z.*

In such action, it is sufficient for *Z.* to declare that, by reason of his possession of the land, he is entitled to have the use and benefit of the water flowing in a certain direction along the channel, and that defendant diverted the water therefrom. It is not necessary to refer to the grant.

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close of the defendant in a certain direction, and through and along a certain channel, unto and into the said close of the plaintiff, for the watering and irrigation of his said close, and the benefit and improvement of the soil thereof, at all times of the year except the first ten days of every month in each year." That defendant, well knowing the premises, but contriving and intending to injure plaintiff, and to deprive him of the use, benefit and enjoyment of the water of the said united stream or watercourse for the purpose aforesaid, and in the manner and at the times aforesaid, heretofore, to wit on 11th *January* 1850, and on divers other days and times between that day and the commencement &c., the said days and times, respectively, being other days and times than the first ten days of each month within that period, "wrongfully and injuriously diverted and turned the course of the said stream and watercourse, and thereby, on each of the said days and times, wholly hindered and prevented the water thereof from running and flowing in its proper course and channel, and in the direction last aforesaid, as of right it ought to have run and flowed, and otherwise would have run and flowed, unto and into the said close of the plaintiff, for the watering and irrigation of the said last mentioned close; and thereby, on the several days and times aforesaid, wholly deprived the plaintiff of the use and benefit of the said water for the purpose aforesaid."

The second count charged that defendant, on other days &c., not being any of the first ten days &c., "wrongfully and injuriously so placed, disposed and kept certain fenders, then being in and upon the said close of the defendant, and in and upon the said united stream there, that, by means thereof, the water of the

said last mentioned stream and watercourse was, on each of the days and times last aforesaid, wholly hindered and prevented from running and flowing in its proper course and channel, and as of right it ought to have done, unto and into the said close of the plaintiff, for the purpose aforesaid :” and plaintiff, during all the time last aforesaid, was thereby wholly deprived of the use, benefit and enjoyment of the said water for the watering and irrigating of his close.

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Pleas: 1. Not guilty. Issue thereon.

2. That plaintiff was not possessed of the close. Issue thereon.

3. That plaintiff “was not, by reason of the possession of the said close, entitled to have the use and benefit of the said water, in manner” &c. Issue thereon.

4. That the said united stream and watercourse did not run and flow, nor ought it of right to have &c., nor ought it of right still &c., “in the manner and at the times in the said declaration described, into the said close of the plaintiff in the declaration mentioned, for the purposes in the said declaration alleged, in manner” &c.: conclusion to the country. Issue thereon.

5. Leave and licence: verification. Replication: De injuriâ. Issue thereon.

6. That, “before any or either of the said several times when &c., the defendant was seised in his demesne as of fee of and in certain, to wit four, closes of land on the bank of, and next adjoining to, the said stream and watercourse in the declaration mentioned; which were higher up and nearer the source of the said stream and watercourse than the said close of the plaintiff in the declaration mentioned: and that the defendant, and all those whose estate he now hath in the said closes of

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land, have, from time whereof" &c., "been used and accustomed of right to have and enjoy, and the defendant, at the said several times when &c., ought of right to have had and enjoyed, and the defendant ought of right now to have and enjoy, the benefit and advantage of a reasonable quantity of the water of the said stream and watercourse for the irrigation of the said closes of the defendant, and the more beneficial enjoyment thereof, as to the said closes belonging and appertaining, doing no unnecessary damage to those entitled to the benefit and advantage of the water of the said stream and watercourse, or any part thereof, in any part thereof, or to any other person or persons whatsoever, and diverting and turning only such reasonable quantity as aforesaid, and no more than should be necessary for the purpose aforesaid: without this, that the said stream and watercourse in the declaration mentioned ran and flowed, and of right ought to have" &c., "and still of right" &c., "in the manner and at the times in the declaration described, and for the purposes in the declaration mentioned, in manner" &c.: conclusion to the country. Issue thereon.

7. Allegation of defendant's seisin of four closes, as in plea 6., and alleging "that the defendant, and all those whose estate he now hath in the said closes of land, for the period of twenty years next before the commencement of this suit, enjoyed, as of right and without interruption, the benefit and advantage of a reasonable quantity of the water of the said stream and watercourse, for the irrigation of the said closes of the defendant, for the more beneficial enjoyment thereof, as to the said closes belonging and appertaining, and, to this end and for this purpose, as occasion required, to divert and

turn the course of the said stream and watercourse in the parts next to and adjoining the said closes of the defendant, and to place, dispose and keep fenders there, and in and upon the said stream there, doing no unnecessary damage to those entitled to the benefit and advantage of the water of the said stream or any part thereof, in any part thereof, or to any other person or persons whatsoever, and diverting and turning only such reasonable quantity as aforesaid, and no more than should be necessary for the purpose aforesaid." "That, before and at the said several times when &c., irrigation was necessary for the said closes, and that, in exercise of his said right, and for that and no other purpose, he did, at the said several times when &c., commit the said several acts in the declaration mentioned, doing no unnecessary damage to the plaintiff, and diverting and turning only such reasonable quantity as aforesaid of the said water, and only so much thereof as was necessary for the purpose aforesaid: as he lawfully" &c.: verification. Replication: Traverse of the enjoyment. Issue thereon.

On the trial, before *Martin B.*, at the *Devonshire* Summer Assizes, 1852, the plaintiff gave in evidence an agreement under seal, dated 30th *September* 1836, between *Sylvanus Fox*, of the one part, and *Edward Fox*, the said *Sylvanus Fox*, *Samuel Fox*, *Henry Fox* and *Charles Fox*, of the other part. Whereby (amongst other things) it was recited that the lowest of four closes called *Tanner's Meadows* had been conveyed to the use of *Sylvanus Fox* in fee; and it was agreed "that the owners or owner, for the time being," of the *First Tanner's Meadow*, the *Second Tanner's Meadow* and the *Third Tanner's Meadow*, of which three meadows the

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agreement stated that the said *Henry Fox* was then owner in fee simple, "and the said *Sylvanus Fox*, his heirs, appointees and assigns, shall respectively have and enjoy for ever hereafter such rights and benefits as hereinafter expressed: that is to say: It shall and may be lawful to and for the owner or owners for the time being of the said *First, Second* and *Third Tanner's Meadows*, now belonging to the said *Henry Fox*, to have and use, at all times, for the purpose of irrigating his said two meadows above described as the *First Tanner's Meadow* and the *Second Tanner's Meadow*, or any part thereof, respectively, all the water which flows through the said *First Tanner's Meadow*; and also to have and use, during the first ten days of every month, for the purpose of irrigating the meadow above described as the *Third Tanner's Meadow*, the water of a stream which flows into and at the South Eastern corner of the said *Third Tanner's Meadow*, including the water of a warm spring which rises in the said *Second Tanner's Meadow*: provided, nevertheless, that at all other times the water of the said last mentioned stream and spring shall respectively be under the controul and at the disposal of the said *Sylvanus Fox*, his heirs, appointees or assigns, and be allowed to pass and flow in a free and uninterrupted course towards and into the premises so conveyed to, or in trust for, him and them as aforesaid, through a channel about twelve cloth yards from the hedge which forms the Southern boundary of the said *Third Tanner's Meadow*; and that the owner or owners for the time being of the said *Second* and *Third Tanner's Meadows* do and shall, at his or their own expense, keep such channel and spring in repair, and properly scoured or cleaned out, as often

as it may be needful: and, in case such owner or owners shall neglect or refuse so to do, the said *Sylvanus Fox*, his heirs, appointees and assigns, shall and may (on giving such owner or owners ten days' previous notice in writing) enter upon the said last mentioned meadows, or any part thereof, and cleanse and repair the said channel and spring when and as often as it may be expedient."

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The close so recited to have been conveyed to *Sylvanus Fox* was identified with the *Fourth Tanner's Meadow*, named in the declaration; and the *Second Tanner's Meadow* and *Third Tanner's Meadow*, named in the agreement, were identified with the closes so named in the declaration. It was proved that the plaintiff was owner and occupier of the *Fourth Tanner's Meadow* by conveyance from *Sylvanus Fox*; and that the defendant was owner and occupier of the *First*, *Second* and *Third Meadows* by conveyance from *Henry Fox*. It was also proved that the water ran along the channel described in the declaration, as stated, until the defendant turned it in the manner complained of in the breach. For the defendant, it was insisted that the water, though diverted from a part of the channel, was restored to it at a lower spot, so that, in effect, the plaintiff had the full use of the water. The learned Baron expressed his opinion that this afforded no defence, but that the plaintiff was entitled to insist upon the water flowing throughout in the channel described; and he further ruled that the plaintiff might recover for the infringement of this right upon the declaration framed as above. A verdict was taken for plaintiff, with nominal damages.

1853. In *Michaelmas* term, 1852, *Kinglake* Serjt. obtained a
 NORTHAM rule *Nisi* for a new trial on the ground of misdirection.
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Crowder and *Montagu Smith* shewed cause; and *Kinglake* Serjt. and *Phinn* supported the rule. It is considered sufficient to refer to the judgment of the Court.

Cur. adv. vult.

COLERIDGE J. now delivered the judgment of the Court.

In this case the plaintiff, occupying *Fourth Tanner's Meadow*, complained that the defendant had diverted the channel of a watercourse in *Third Tanner's Meadow*. And, in support of his case, he relied upon a deed between *Sylvanus Fox*, owner of *Fourth Tanner's Meadow*, and *Edward Fox* and others, owners (b) of *First, Second* and *Third Tanner's Meadows*, whereby it is stipulated that *Edward Fox* and the others should have the use of a certain stream of water for irrigation for ten days in every month, and that at all other times the same stream should be under the controul of *Sylvanus Fox* and his assigns, and should flow in a free and uninterrupted course, through a channel therein particularly described, into *Fourth Tanner's Meadow*; with an undertaking that the owners of *First, Second* and *Third Tanner's Meadows* should cleanse the channel, and with

(a) *Monday, January 31st.* Before Lord Campbell C. J., Coleridge, Wightman and Erie Js.

(b) The interests of *Edward, Samuel* and *Charles*, in the soil, appeared to have determined before the execution of the agreement.

liberty to *Sylvanus Fox* and his assigns to do so on their default.

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This deed, in our judgment, operates as a grant of the easement of the watercourse therein described: and, inasmuch as the channel is specified, with a right to enter and cleanse that channel, we are of opinion that *Sylvanus Fox*, and those claiming under him, acquired a right in respect of that channel; and that a change of the channel would be an injury to this right. And, as the plaintiff claimed under *Sylvanus Fox*, and the defendant, claiming under the owners of *First, Second* and *Third Tanner's Meadows*, had diverted the stream from the specified channel, though without damage to the plaintiff, we think there was a cause of action for injury to the right.

Our judgment is founded on the effect of the deed which governs the rights of the present parties: and, in so deciding, we do not intend at all to limit the salutary principle laid in *Embrey v. Owen* (a), to the effect that the superior riparian proprietors may use the stream for all reasonable purposes while in their land, provided they send it on, without material diminution or alteration, to inferior proprietors.

It was further objected that, if such was the case, the plaintiff could not recover for it under the present declaration, claiming the right by reason of possession without mentioning or referring to the deed. But this objection we think untenable. If the easement was granted to the owners of *Fourth Tanner's Meadow*, we think the precedents are clear that it may be described

(a) 6 *Exch.* 353.

1853. in a declaration as an easement to which the plaintiff is
 NORTHAM entitled by reason of his possession of that meadow.
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 HURLEY. Therefore the rule will be discharged.

Rule discharged.

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LEVERICK v. MERCER.

This case will be found reported in 14 *Q. B.*

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WILTSEAR *against* THOMAS COTTRELL.

Trustees, **C**ASE. The first count stated that, before and at the
 seized under a times of the committing &c., divers, to wit four,
 devise in fee of closes, with the appurtenances, situated &c., were re-
 a farm, leased spectively in the possession and occupation of *James*
 to defendant, one of them- *May*, as tenant thereof respectively to plaintiff, the
 selves, for a term, and afterwards, in the character
 of trustees
 only, conveyed the land to plaintiff in fee, with all fixtures: Held that defendant, being
 a party to the conveyance, could not, after the conveyance, under the general law or the
 custom of the country, remove, at the expiration of his term, farm machinery annexed to
 the land.

And that he was therefore liable to plaintiff, who had demised to *M.*, in case for injury
 to the reversion, for removing staddles built into the land for the purposes of supporting
 ricks, and a threshing machine attached by bolts and screws to pillars fixed in the land,
 assuming that he might have removed them if they had been placed there by himself and he
 had not joined in the conveyance.

That a granary, resting by its mere weight on staddles built into the land, was a chattel,
 and would not be a fixture, in the ordinary sense of the word, though it might pass by that
 word if, from the rest of the conveyance, an intention appeared of comprehending farm
 machinery in general. But that, even then, plaintiff could not recover against defendant
 for carrying it away, either as for an injury to the reversion in the land, the chattel not being
 part of such reversion, or in trover, *M.* being entitled to the exclusive possession of the
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reversion of and in the same closes respectively then and still belonging to plaintiff: yet defendant, well knowing &c., but contriving &c. to injure, &c. plaintiff in his reversionary estate and interest of and in the said closes, with the appurtenances respectively, whilst plaintiff was so interested therein, to wit on 1st *May* 1852, and on divers other days and times between that day and the commencement of this suit, wrongfully and unjustly, and without the leave or licence and against the will of plaintiff, broke, pulled down and destroyed, and removed and carried away, a certain building called and known by the name of the granary, then being in and upon one of the said closes, and affixed thereto, and forming and being part thereof; and then broke and threw down divers, to wit 1000, bricks, and divers, to wit 1000, pieces of wood, and divers, to wit 1000, slates, and divers, to wit 1000, tiles, of and belonging to the granary, and with which the granary was then and there built, and then being of great value, to wit 50*l*.; and also then broke, pulled down and destroyed, and removed and carried away, divers, to wit 50, rick staddles, and divers, to wit 50, rick stones, of great value, to wit 20*l*., then being in and upon another of the said closes, and affixed thereto, and forming and being part thereof; and also then broke and pulled down, and removed and carried away, divers, to wit 2, threshing machines, and 2 other machines, of great value, to wit 100*l*., then affixed to, and forming and being part of, another of the said closes; and also then dug up and pulled down, removed and carried away, divers, to wit 10, posts of great value, to wit 10*l*., then affixed to, and forming and being part of, another of the said closes: whereby, and by reason of which said several premises, plaintiff has

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been and is greatly injured &c. in his said reversionary estate and interest of and in the said closes and premises, with the appurtenances, respectively, so in the possession and occupation of the said *James May*, as tenant thereof to the plaintiff as aforesaid.

Second count. Trover for threshing machines, other machines, posts, loads of tiles, bricks, pieces of wood, slates, rick staddles and rick stones.

Pleas: 1. Not guilty. Issue thereon.

2. To first count: That the closes in the first count mentioned were not, nor were any or either of them, or any part thereof, at the times when &c. in the first count mentioned, in the possession and occupation of *James May*, as tenant thereof respectively to plaintiff, in manner &c.: conclusion to the country. Issue thereon.

3. To second count: That plaintiff was not, at the said time when &c. in the second count mentioned, possessed of the said goods &c., or any &c., as of his own property, in manner &c.: conclusion to the country. Issue thereon.

On the trial, at the *Oxfordshire* Summer Assizes, 1852, before *Williams J.*, it appeared that the defendant, during the latter part of *May* 1852, had carried off from the premises in question certain staddles, a threshing machine, and a granary. The staddles were erections for the support of a rick; they were stone pillars, mortared into a foundation of brick and mortar, which was let into the earth; stone caps were mortared on to them at the tops; and on these the ricks rested. The threshing machine was placed inside one of the barns (the machinery for the horse being on the outside), and there fixed by screws and bolts to four posts which were let into the earth. The granary consisted of a wooden shed, tiled over; it rested by its mere weight upon a wooden frame, which

rested upon staddles constructed like the staddles first described. All these articles had been erected or maintained upon the land in question by *Thomas Cottrell*, the defendant's father, who at that time was in occupation, and who died seised in fee in *June* 1842.

Thomas Cottrell, the father, devised the premises, by the words, all that his "messuage or tenement, farm, lands and hereditaments, called *Kingwood Farm*, situate" &c., and then in his own occupation, "with the rights, members and appurtenances thereto belonging," unto and to the use of his sons *Thomas* (the defendant), *Henry* and *George*, and his brother in law *Thomas Challis*: Upon trust, during the minorities of his sons *William* and *Edward*, to apply the rents for their benefit; and, on *Edward* attaining twenty one, to sell the hereditaments by public auction or private contract, at such time &c., and subject to such conditions &c., as the said trustees should think proper, with power to convey to a purchaser. By a codicil he appointed his son *John* to be a joint trustee and executor.

After the death of *Thomas Cottrell* the father, the defendant was let into possession of the farm under a written demise from himself and his cotrustees, for a term which expired at *Michaelmas* 1851. By this demise there was granted to him the use of the barns, and convenient stable and house and yard room, for his men, horses and cattle, for the purpose of clearing off the last year's crop, until the 1st day of *June* next after the expiration of the tenancy.

The sons *William* and *Edward* having attained their majority, *Thomas Cottrell* (the defendant), *Henry Cottrell*, *George Cottrell* and *John Cottrell* (*Thomas Challis* being dead), having first unsuccessfully attempted to effect a

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sale by public auction, agreed to sell to the plaintiff; and he, after the execution of the agreement, demised for a term to *James May*, who entered into possession in *January* 1852. In pursuance of this agreement, the surviving trustees afterwards conveyed the property to plaintiff in fee, by indenture of 25th *March* 1852, between defendant, *Henry, George and John Cottrell*, "surviving devisees in trust named in the last will and testament of *Thomas Cottrell*," "and the codicil thereto," of the first part, *Elizabeth Cottrell*, widow of the devisor, of the second part, *William and Edward Cottrell*, the sons, of the third part, *James Wilt shear* (plaintiff) of the fourth part, and *John May* of the fifth part. The indenture recited the will, the devisor's death, the proof of the will, the death of *Challis*, that defendant was the devisor's eldest son and heir at law, and that *William and Edward* had attained their majorities, that *Elizabeth* became party for the purpose of releasing her dower, and *William and Edward* for the purpose of testifying their consent. And it was witnessed that, in pursuance of the power contained in the will, and in consideration of 3100*l.* paid by defendant to the surviving trustees, *Thomas Cottrell, Henry Cottrell, George Cottrell* and *John Cottrell*, "according to their estate and interest as such surviving trustees as aforesaid," and *Thomas Cottrell* "as such heir at law," did, and each of them did, grant, release, convey and confirm, and *Elizabeth Cottrell* confirmed, unto *James Wilt shear*, and his heirs for ever, "all that messuage or tenement, or farm house, with the barns, stables and other appurtenances to the same belonging, situate, standing and being at or near *Kingwood*," &c., "and also all and singular the several closes, pieces and parcels of arable land to the said messuage or tenement belonging and

hereinafter particularly mentioned, that is to say," &c. (setting them out). "All which said hereditaments and premises are situate" &c., "and were sometime since in the possession or occupation of" &c., "afterwards of *Thomas Cottrell*, the father of the said *Thomas Cottrell* the testator, and then of the said *Thomas Cottrell* the testator, and afterwards of the said *Thomas Cottrell*" (defendant). All which farm, lands, hereditaments and premises, thereinbefore described, and intended to be thereby granted, released and conveyed, were more particularly known by the description contained in the Schedule thereunder written; and the site thereof was more particularly shewn in the plan drawn in, and forming part of, the said Schedule; and were then in the occupation of *James May*. And all other (if any) hereditaments and premises so as aforesaid devised by *Thomas Cottrell* the testator to the said parties thereto of the first part, by the description of all that his mesuage or tenement, farm, lands and hereditaments, called *Kingwood Farm*, situate and being in &c.; and then in his own occupation: with the rights, members and appurtenances thereunto belonging; "and all fixtures, trees, hedges, ditches, fences, pales, rails, waters, watercourses, profits, commons and commonable rights, advantages, emoluments, easements and appurtenances whatsoever, corporeal and incorporeal, to the same farm, lands, hereditaments and premises now or at any time heretofore belonging or in anywise appertaining;" and the reversion and reversions, remainder and remainders, thereof yearly, and other rents and profits arising therefrom, and all the estate, right, title, interest, use, trust, inheritance, property, possession, benefit, claim and demand whatsoever at law and in equity, of *Thomas*

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1858. *Cottrell* (defendant), *Henry, George, John, Elizabeth,*
William and Edward Cottrell, respectively, into and
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thereby granted, released and conveyed, or intended so
to be, &c. To hold the said farm, lands, hereditaments
and premises thereinbefore described, and all other the
premises thereby granted, released and conveyed, or
intended so to be, with their appurtenances, unto the
said *James Wiltshear* and his heirs for ever, to the uses
thereinafter declared.

The Schedule referred to in the indenture specified:
“A freehold estate, comprising a recently erected
farm-house, two barns, two cart-sheds, stabling for
nine horses, double shed, with walled yard, piggery
and poultry house, rick and farm yards, garden and
orchard, well stocked with fruit trees, together with
112 A. 2 R. 26 P. of well cultivated arable and pasture
land, subdivided into convenient inclosures as follows.

Description		Culture			A.	R.	P.
No. on plan.	1. Dwelling house, yards, garden, orchard, farm-buildings	Homestead	1	2	3		
	2. Meadow Close	Pasture	4	3	28		

with ten more items. It was agreed that none of the
articles taken away by the defendant were specifically
mentioned in the schedule: but it was insisted, for the
plaintiff, that they came within some or one of the
general terms. In the plan, the place where the granary
stood was indicated by a red mark.

The defendant had finished carrying off his crops
before the end of *May* 1852, and had made the removal
almost immediately after, in the same month. It was
admitted that he had done no more injury to the
soil, or the erections let into it, than was necessary for

the removal of the articles which were the subject of the action. On the part of the defendant, evidence was given to shew that, by the custom of the country, an outgoing tenant had the right to remove such things at the expiration of his tenancy: and it was further contended that he was entitled to do so by the general law of the land. For the plaintiff this was denied: and it was contended, further, that, even if this were so, the language of the conveyance took away the right. A verdict was taken for the plaintiff for 30*l.*, the parties agreeing that the staddles and threshing machine should be estimated at 10*l.*, and the granary at 20*l.*: and leave was reserved to move as after mentioned.

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In *Michaelmas* term, 1852, *Keating* obtained a rule *Nisi* for entering a verdict for the defendant, or for reducing the amount of damages as the Court should direct. In last term (*a*),

Whateley and *Phipson* shewed cause. Even as outgoing tenant, the defendant could not have removed any tenant's fixtures except such as he had put up himself; whereas all the articles in question were put up by the original owner of the fee. But, further, all fixtures passed under the deed of 25th *March* 1852, to which the defendant was party. It is therefore not material, in the case of any article which can be shewn to be a fixture, to consider whether it is such as the defendant, had he been merely an outgoing tenant, would have been entitled to remove. Whatever is inseparably annexed to the freehold passes *a fortiori*. First: the staddles are built into the land:

(*a*) *January* 13th 1853. Before Lord Campbell C. J., Coleridge, Wightman and Crompton Js.

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it seems therefore that they are not even fixtures removeable by an outgoing tenant. Secondly: the threshing machine, being connected by bolts and screws with the posts which are inserted in the soil, might perhaps be removeable by an outgoing tenant. But it is not the less a fixture. Indeed the character of fixture appears to belong emphatically to that which the tenant has a right to remove: *Parke B.*, in *Mackintosh v. Trotter* (a), explaining a sale of fixtures by an outgoing to an incoming tenant, said: "He sells the right to remove, which is described under the word *fixtures*." When chattels are "fixed to the freehold by a tenant, they become part of it, subject to the tenant's right to separate them during the term, and thus reconvert them into goods and chattels;" *Hallen v. Runder* (b). That which is absolutely irremovable, as bricks and mortar, is never called a fixture. [Lord Campbell C. J. I do not know that "fixture" is a legal term at all: it is not in *Termes de la Ley*.] Thirdly, the granary, inasmuch as it rests by mere weight on the wooden frame which rests on the caps, appears to be a chattel, according to the authorities; *Rez v. Otley* (c), *Wansbrough v. Maton* (d). But it might nevertheless be a fixture in the sense of that word which seems to be adopted by the deed. At any rate, it passed by the words in the body of the deed, "messuage, or tenement, or farmhouse, with the barns, stables and other appurtenances to the same belonging," and by the description in the schedule, which includes "farm-buildings;" these terms clearly comprehend all agricultural buildings, whether fixed to the soil or not. And, further, the site of the

(a) 3 M. & W. 184. 186.

(b) 1 C. M. & R. 266. 275.

(c) 1 B. & Ad. 161.

(d) 4 A. & E. 884.

granary is marked on the plan (a). It will be said that the taking of the chattel, even if it passed by the conveyance, is not an injury to the reversionary estate in the land. But the plaintiff may recover on the count in trover: his tenant indeed, while the chattel remained on the land, was entitled to the use of the chattel; but, the property being in the plaintiff, he may recover for it in trover as soon as it is severed. [Coleridge J. Can he do so before the expiration of the term. Is not *Gordon v. Harper* (b) an authority against that?] That was the case of mere furniture, which was demised: the present case is more like that of a branch severed from a tree on demised premises. [Coleridge J. The tenant has no right at all to the possession of a severed branch.] There is no inconsistency in supposing that both the owner and the party entitled to immediate possession may maintain the action: a double right like this exists in cases of bailment, as to a carrier. In *Farrant v. Thompson* (c) machinery in a mill was demised, with the mill, to a tenant who severed it; and it was afterwards seized under a fi. fa.; and it was held that the landlord might recover for it in trover during the term. The cases are collected in note (1) to *Wilbraham v. Snow* (d). [Coleridge J. The goods in *Farrant v. Thompson* (c)

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(a) It was also urged that the defendant was estopped from denying that the granary passed by the conveyance, by the fact that, at the time of the purchase, he had gone over the land with the plaintiff's agent, and had indicated the granary as part of the property purchased; and *Pickard v. Sears* (6 A. & E. 469) and *Gregg v. Wells* (10 A. & E. 90.) were referred to. But it was answered that the defendant, at the trial, had offered other evidence of what took place on the occasion, which had been objected to on the part of the plaintiff, and withdrawn: and this point was not further noticed in the argument or judgment.

(b) 7 T. R. 9.

(c) 5 B. & Ald. 826.

(d) 2 Wms. Suund. 47 b—47 c.

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were parcel of the inheritance, and had been severed by the wrongful act of the tenant to whom they had been demised: and in the judgments these circumstances are relied upon.] The granary here was sold as part of the freehold: and the defendant has tortiously removed it, claiming to act as tenant.

Keating and *H. J. Hodgson*, contra. The language of the deed, when taken altogether, leads to the inference that by "fixtures" are meant, not things removeable, but things which are inseparably part of the inheritance, like the trees and hedges, which are mentioned in the same list. The plan is referred to in the deed, only, as shewing "the site" of the "farm, lands, hereditaments and premises." But, if these articles did pass by the conveyance under the word "fixtures," they have since been severed and cease to be part of the realty; and, according to *Gordon v. Harper* (a), the proper party to sue for the chattel is the tenant who is entitled to the exclusive enjoyment. The authorities as to the removeability of fixtures in general are collected in *Amos and Ferard's Treatise on the Law of Fixtures*, Part I. ch. 2. s. 2., and in Mr. *Smith's* note (b) to *Elvoss v. Maw* (c). The test as to articles being part of the freehold was lately much discussed in *Hellawell v. Eastwood* (d), where *Parke* B., in delivering the judgment of the Court, laid down, as one test, "the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law, *perpetui usus causâ*, or in that of

(a) 7 T. R. 9.

(c) 3 East, 38.

(b) 2 Smith's Lea. C. 114.

(d) 6 Esch. 295. 312.

the *Yearbook* (a), pour un profit del inheritance, or merely for a temporary purpose, or the more complete enjoyment and use of it *as a chattel*." Accordingly, in that case it was held that the landlord might distrain spinning mules fixed into the house. Now, as to all the articles in question, the object of the annexation has clearly been the more convenient use of that which has been annexed, not the improvement of the land to which it has been annexed. *Penton v. Robart* (b), *Davis v. Jones* (c) and *Foley v. Addenbrooke* (d) shew that the outgoing tenant may remove machines fixed to the freehold provided he do no more damage to the freehold than is necessary for the purpose of removing. Such removals may also be justified under the custom of the country; *Culling v. Tufnal* (e), 11 Vin. Abr. 154. *Executors* (U) pl. 74. It appears to be admitted that the granary is a mere chattel, and that it is not specified in the deed or schedule. It therefore would no more pass by the deed than the horses or cows on the farm. But, whether it passed or not, it could not be recovered for in this action: the chattel is not part of the reversionary estate in the land, so as to come within the first count; nor has the reversioner any right to the possession, so as to support the count in trover. *Farrant v. Thompson* (g) is inapplicable: the right of the tenant in possession was there defeated by his own wrongful act: here the act in question is that of the outgoing tenant, and, if tortious, does not determine the interest of the tenant *May*. The authorities on this point are collected in *Amos and Ferard*, 223, 4 (2d ed.), Part I. ch. 5. But, further,

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(a) *Mich.* 20 H. 7. fol. 13 B. pl. 24.(b) 2 *East*, 88.

(c) 2 B. & Ald. 165.

(d) 13 M. & W. 174.

(e) *Bul. N. P.* 34.

(g) 5 B. & Ald. 826.

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the deed of 25th *March* 1852, does not defeat the claim of the defendant as outgoing tenant. He held as tenant, under the demise from himself and his cotrustees, and, under the terms of the demise, was entitled to use the agricultural erections on the ground, till his crop was cleared off. In respect, therefore, of the use of all the farming machinery his interest extended beyond the date of the removal. Now in the deed of 25th *March* 1852, he is a party only as one of the surviving trustees; and he conveys only according to his estate and interest as such surviving trustee and as heir at law, words evidently introduced for the express purpose of reserving his interest as lessee. If he was tenant in possession, *May* was not, and then the defendant must succeed on the second issue: but, if *May* was tenant, the defendant was a stranger and *Farrant v. Thompson* (a) is inapplicable.

Cur. adv. vult.

COLERIDGE J. now delivered the judgment of the Court.

This was an action for an injury to the reversionary estate of the plaintiff in premises occupied by a tenant of the name of *James May*, by removing some staddles, a threshing machine and a granary. There was also a count in trover. The defendant pleaded: first, Not guilty: secondly, to the first count, that the closes were not in the occupation of the tenant, the reversion belonging to plaintiff: and, thirdly, to the count in trover, a denial of the possession.

It appeared that the plaintiff had purchased the premises in question from the devisees in trust of one

(a) 5 B. & Ald. 826.

Thomas Cottrell, deceased, the father of the defendant: and the premises had been conveyed to the plaintiff by a deed, dated 25th *March* 1852, to which the defendant was a party as one of the devisees. The plaintiff demised the premises to *May* immediately after the conveyance: and the defendant had removed the staddles, threshing machine and granary from the premises after the demise to *May*. The defendant had been in the occupation of the farm at the time of the conveyance; and an attempt was made to set up a right to remove by him as outgoing tenant; and some evidence of a custom to remove such articles was given. This claim on the defendant's part appeared however to be entirely without foundation. The deed, which the defendant had executed as a conveying party, conveyed the land and all *fixtures*: and it appeared that the erections had been put on the land by the defendant's father, who had subsequently become owner in fee, and under whose will the title had come to the defendant. The defendant, therefore, clearly could not set up any right to remove any of the articles as fixtures removable by an agricultural tenant. The land and every thing attached to the land passed by the deed: and there was no tenant-right to remove any of the articles in question.

The real question in the cause therefore was, whether all or any of the articles in question passed by the conveyance. This must be determined by reference to the words of the conveyance, and the nature of the respective articles. The words used in the conveyance are *primâ facie* applicable to real property only. They convey "all that messuage or tenement, or farm house, with the barns, stables and other appurtenances to the

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same belonging," "and also all and singular the several closes," which are afterwards enumerated, "all which farm lands, hereditaments and premises, thereinbefore described," "were more particularly known by the description contained in the schedule" to the deed annexed, "and the site thereof was more particularly shewn in the plan" on the deed; "with the rights, members and appurtenances thereunto belonging," "and all *fixtures*, trees, hedges, ditches, fences," &c.

The staddles were erections for the purpose of supporting ricks, and were stone pillars mortared to a foundation of brick and mortar let into the earth, with stone caps mortared on the pillars: and it is clear that such erections would pass under the conveyance, either as part of the land or as fixtures.

The threshing machine was fixed by bolts and screws to posts which were let into the ground; and the machine could not be got out without disturbing some of the soil: and, being so attached to the land, would clearly pass under the conveyance.

It was contended by Mr. *Keating* that the first count was inapplicable to the removal of these articles; as he said they could be removed without real injury to the inheritance, and therefore that there was no injury to the reversionary estate. As they were really attached to, and part of, the land, their removal was clearly an injury to the reversionary estate as a removal of so much of the land.

The question as to the granary involves more difficulty. It appeared to be laid on a wooden foundation, supported by staddles; and it lay upon them in the same manner that the ricks lay upon the rick staddles. The part above the stone caps was wood with a tile roof. In

removing this granary, the caps of the staddles and the upright stones were taken away: but it appeared that it was not attached, except by its weight, to the staddles; as it was proved that by sufficient power it might have been lifted from the staddles without disturbing them.

We think that we are bound by the authorities to consider such an erection as a mere chattel, and neither as part of the land or affixed to the freehold. In *Culling v. Tufnal* (a) a barn erected on pattens and blocks of wood, but not itself affixed in or to the ground, was held to be removeable. The custom of the country was relied on in that case as making such erections removeable by an outgoing tenant: but Lord *Ellenborough*, in the great case of *Ehoses v. Maw* (b), in referring to *Culling v. Tufnal* (a), treats the barn as having been clearly removeable without any custom, because *it was not a fixture at all*, as not being fixed in or to the ground. In *Wansbrough v. Maton* (c) it was decided that a barn resting by its mere weight on a brick foundation was not a fixture, but was a mere chattel for which trover might be brought. Mr. Justice *Patteson* referred in that case to *Rex v. Otley* (d), where it was held that a windmill, resting by mere weight on a foundation of brick, was not a part of the freehold so as to contribute to the value of the tenement. In *Rex v. Londonthorpe* (e) it was held that a windmill not attached to the ground, but constructed on cross traces laid upon brick pillars, but not attached or affixed thereto, was a mere chattel.

On these authorities, we think that the granary in question must be treated as a mere chattel, and not as a

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(a) *Bull. N. P.* 34.(b) 3 *East*, 38.(c) 4 *A. & E.* 884.(d) 1 *B. & Ad.* 161.(e) 6 *T. R.* 377.

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part of the land, nor as so affixed to the freehold as that its severance would give a cause of action for injury to the reversionary estate in the land, the subject of the first count.

It has been suggested, however, that it might pass as a chattel under the word "fixtures" in the conveyance: and it is said that the red mark in the plan, shewing the site of the granary, tends to prove that it was intended so to pass. The word "fixtures," though properly applicable to something annexed to the freehold, is sometimes used in a larger sense. See *Sheen v. Rickie* (a), where it is said, by Baron Parke: "it does not necessarily follow, that the word 'fixtures' must import things affixed to the freehold, nor has the word necessarily acquired that legal sense. It is a very modern word, and is generally understood to comprehend any article which a tenant has a power of removing." It may be doubtful whether the word "fixtures," as used in this conveyance, immediately followed by the words "trees, hedges, ditches, fences," and without there being any other words in the conveyance denoting any intention of passing chattels, can be construed as sufficient to pass the granary as a mere chattel. The plan is said in the deed to shew the site of the premises: and the site of the granary was stated on the argument to be marked in red ink. And, no doubt, the permanent erections and the staddles on which the granary rested would pass: but it is not so clear that a mere chattel resting on such a site would pass.

Considering, however, that this article was put up so long ago by a party who became owner of the freehold,

(a) 5 M. & W. 175. 182.

that it seems to have been always demised with the freehold, and remembering that the word "fixtures" is capable of the larger meaning pointed out in the case we have referred to from the Exchequer, and considering that the red mark seems to include the granary, we should have been disposed to hold that it might have passed as a chattel if we had found that either count could be supported on that supposition.

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The first count, for injury to the reversionary estate in the land, is clearly not applicable to the abstraction of a chattel: and the count in trover seems inapplicable according to the case of *Gordon v. Harper (a)*, as the possession of the chattel for the term was in *May* at the time of the removal.

We think, therefore, that the verdict should be reduced by the value of the granary, which was separately assessed by the jury at 20*l*.

Rule absolute for reducing the verdict
from 30*l*. to 10*l*.

(a) 7 T. R. 9.

END OF HILARY VACATION.

1853.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

EASTER TERM,

XVI. VICTORIA.

The Judges who usually sat in Banc in this term
were:

Lord CAMPBELL C. J.
WIGHTMAN J.

ERLE J.
PATTESON J.

MEMORANDUM.

In the Vacation preceding this Term, *William Milbourne James*, of *Lincoln's Inn*, Esquire, and *Henry Alworth Merewether*, of the *Inner Temple*, Esquire, were appointed Her Majesty's Counsel.

The following Rule was read in Court on the 16th of *April*.

REGULA . GENERALIS.

It is ordered that there be laid before this Court, on the first Crown Paper Day in every term, a list of the several cases in which recognizances have been filed to prosecute writs of error in misdemeanour returnable in this Court, together with the names of the several cases in which default hath been made in prosecuting such writs of error, according to the course and practice of this Court. 1853.

CAMPBELL.

J. T. COLERIDGE.

WM. WIGHTMAN.

W. ERLE.

CHAS. CROMPTON.

16 *April*, 1853.

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Saturday,
April 16th.

The QUEEN *against* The METROPOLITAN
COMMISSIONERS of SEWERS.

Under sects. 69, 70, of The Metropolitan Sewers Act, 1848 (11 & 12 Vict. c. 112.), power is given to resort to arbitration in those cases only where the mere amount of compensation is disputed: not in cases where the liability to make any compensation is denied.

GARTH, in last *Michaelmas* term, obtained a rule calling on *The Metropolitan Commissioners of Sewers* to shew cause why a mandamus should not issue, commanding them to make a decree, directing out of what rate or rates levied or to be levied under an Act passed &c. (11 & 12 Vict. c. 112.), compensation to the amount of 190*l.* should be made to *Edward Collins* and *Edwin Downs*, for damage sustained by them by reason of the exercise of some of the powers of the said Act, and also the further sum of 43*l.* 19*s.* 6*d.*, being the costs awarded by the arbitrator, *Alfred Ainger*, to be paid to the said *E. Collins* and *E. Downs*, and duly taxed at that amount, should be paid.

From the affidavits upon which the rule was obtained, it appeared that *Collins* and *Downs* were the landlords of *The Compasses* Inn, at *Richmond, Surrey*, within a Metropolitan Sewerage district. The Metropolitan Commissioners of Sewers, under the powers of stat. 11 & 12 Vict. c. 112. ("Metropolitan Sewers Act, 1848" (a)), employed contractors to lay down a system of drainage in the town and parish of *Richmond*. The premises of *Collins* and *Downs* having become cracked and injured while the works in question were being carried on, *George Adam Young*, the agent of *Collins* and *Downs*, addressed a letter on the subject to the

(a) See stat. 12 & 13 Vict. c. 93. s. 1.

Commissioners, about 16th *September* 1851. He received an answer from the secretary to the Commissioners, dated 16 *October* 1851, from which the following is an extract.

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"As regards that portion of your application which relates to alleged damage to *The Compasses* and the other property named by you, by reason of the disturbance of walls and floors, I am instructed to state that, if Messrs. *Collins* and *Downs* have sustained such damage, any compensation they may be entitled to must be claimed from Mr. *Edwards*, of *Slough*, *Bucks*, and Mr. *John Quarrall*, of No. 4, *Britannia Gardens*, *Hoxton*, the contractors for the works in question, whose attention has already been called to the subject."

A correspondence followed, in which *Collins* and *Downs* insisted on the liability of the Commissioners, but the Commissioners adhered to their answer above stated.

On 3rd *June* 1852, *Collins* and *Downs* caused the Commissioners to be served with a copy of the following appointment.

"*The Compasses* public house.

"*Alfred Ainger*, of No. 2, *Carlton Hill*, *Edgeware Road*, in the county of *Middlesex*, surveyor, is hereby appointed an arbitrator by the undersigned parties in respect of the compensation claimed for damage sustained to the public house known or called by the sign of *The Compasses*, situate at *Richmond* in the county of *Surrey*, by reason of the exercise, by *The Metropolitan Commissioners of Sewers*, of certain powers contained in an Act" &c. (11 & 12 *Vict.* c. 112.). Dated 24th *May*, 1852.

"To the above named } (Signed) { *Edward Collins*.
Alfred Ainger. } { *Edwin Downs*."

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At the same time, *Collins* and *Downs* served the Commissioners with a copy of the following notice.

"*The Compasses* public house, *Richmond, Surrey*.

"Take notice that, inasmuch as you have failed to concur in the appointment of a single arbitrator to whom the matter hereinafter mentioned may be referred, *Alfred Ainger*, of No. 2, *Carlton Hill, Edgeware Road*, in the county of *Middlesex*, surveyor, is appointed an arbitrator by the undersigned parties, in respect of the compensation claimed for damage sustained to the public house called or known as *The Compasses*, situate at *Richmond*, in the county of *Surrey*, by reason of the exercise by you of certain powers in you vested by an Act" &c. (11 & 12 *Vict. c. 112.*), "and that a copy of such appointment is hereto annexed. And you will further take notice that you are requested by the undersigned to appoint an arbitrator in respect of the matters aforesaid. And you will further take notice that the matter to be referred is more fully set forth by the statement and specification following." Here followed a specification of injuries-alleged to be done to the premises, and of the repairs necessary to remedy such injuries. Dated 26th *May*, 1852.

The Commissioners not having appointed an arbitrator within fourteen days (*a*), *Ainger*, on 15th *July*, 1852, made the declaration required by sect. 75 of stat. 11 & 12 *Vict. c. 112.* He signed three appointments, dated respectively 19th, 22d and 31st *July* 1852, appointing respectively 22d and 26th *July* and 5th *August*, 1852, for proceeding with the reference: these were served on the Commissioners on 20th and 22d *July* and 2d *August*, 1852, respectively. On the 12th of *August*,

(*a*) Stat. 11 & 12 *Vict. c. 112. s. 70.*

1852 *Ainger* made his award, and declared *Collins* and *Downs* entitled to 190*l.* from the Commissioners, by way of compensation: and that the costs of the reference should be paid by the Commissioners to *Collins* and *Downs*. A copy of the award was served on the Commissioners on 14th *August* 1852. On 19th of *August* 1852, the appointment of *Ainger* as arbitrator was made a rule of Court (a). A copy of this rule was served on the Commissioners on 19th *August* 1852. The costs were taxed at 43*l.* 19*s.* 6*d.*: and, on 27th *August*, a written demand was served by the solicitor of *Collins* and *Downs*, upon the Commissioners, for the 233*l.* 19*s.* 6*d.*, concluding as follows.

“And for this sum of 233*l.* 19*s.* 6*d.*, I, as solicitor for the parties entitled under the award to have payment made to them, do hereby call upon and require you to make (or by your decree to direct) such payment to be made to the said *Edward Collins* and *Edwin Downs*, pursuant to the Metropolitan Sewers’ Act, 1848.”

On 11th *November* 1852, the solicitor of *Collins* and *Downs* served on the Commissioners a notice referring to the demand last mentioned, and to sect. 69 of stat. 11 & 12 *Vict. c.* 112., and adding: “And I do now require you to make a decree directing out of what rates the compensation awarded to the parties in the said notice of the 27th of *August* last shall be made, such compensation appearing in the said notice.”

The solicitor, Mr. *Smythe*, was afterwards served with a copy of the following resolution of the Commissioners.

“Ordered: that Mr. *Smythe* be referred to the previous communication addressed to him from this office,

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(a) See stat. 11 & 12 *Vict. c.* 112. s. 74.

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referring him to the contractors for the works in question.”
No decree had been made; nor had any part of the money been paid.

The affidavits in answer were directed to shewing that the liability was in the contractors and not in the Commissioners: and it appeared that no one had attended the reference on behalf of the Commissioners.

Watson and John Henderson now shewed cause. The proceeding is misconceived. The arbitrator has acted upon an authority supposed to be conferred by stat. 11 & 12 Vict. c. 112. s. 69. But that section was not intended to apply to circumstances like the present. It enacts that “in case of dispute as to amount the same shall be settled by arbitration in the manner provided by this Act;” and then sect. 70 provides in detail for the mode of proceeding by arbitration, “in case of dispute as to the amount of any compensation to be made under the provisions of this Act.” It applies, therefore, only to cases where the liability on the part of the Commissioners to make some compensation is admitted, and the amount alone is in question. Here the liability itself is denied; the Commissioners asserting that this rests with the contractors (a). The arbitrator therefore had no jurisdiction to make this award. There might be no question at all as to the amount though the liability were totally denied. [*Erle J.* If the contractors have acted strictly within the statute, the Commissioners are liable for any damage]. *Regina v. The Corporation of Warwick* (b)

(a) Stat. 12 & 13 Vict. c. 93. s. 4. was referred to as shewing that the Commissioners were considered by the Legislature to be liable only for damage done by works under their controul.

(b) 10 A. & E. 386.

shews what is the proper course to be taken where the liability to compensation, which, if established, would be ground for a mandamus to assess, is disputed in limine: and that case shews also that the tribunal appointed to assess the amount has no jurisdiction to determine on the liability. In the present case, a mandamus should have been applied for, requiring the Commissioners to concur in the appointment of an arbitrator for the purpose of deciding the amount of compensation. The Commissioners could then deny their liability by a traverse of the facts alleged in the writ to shew liability, or might demur to the writ as not shewing the liability; and, if, upon issue of fact or law, their liability were established, a peremptory mandamus would issue. The statute provides no appeal from the award: and the Commissioners, therefore, did right in not attending at the arbitration; they might otherwise have been deemed to admit the liability.

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Bramwell and Garth, contrà. Sect. 69, in the first instance, enacts that compensation shall be made out of the rates. This can be enforced only by a proceeding like the present. It is suggested, on the other side, that a mandamus might go requiring the Commissioners to concur in the appointment of an arbitrator. But to such a writ it would be an answer that no such concurrence is necessary, since, by sect. 70, if either party refuse to concur in the appointment, the appointee of the other party may act for both. Sects. 69 and 70 are rather loosely framed; but there is no doubt that sect. 69 applies to cases, not only where there is a dispute as to a greater or less amount of compensation,

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but, also where the liability to any amount of compensation is denied. A question whether nothing or a hundred pounds is to be paid is in effect a question of disputed amount. The clauses in question appear to be drawn in imitation of the Lands Clauses Consolidation Act, 1845 (stat. 8 & 9 *Vict. c. 18.*), s. 68., and the Railways Clauses Consolidation Act, 1845 (stat. 8 & 9 *Vict. c. 20.*), s. 6. Now these sections are clearly intended to embrace disputes as to liability. In *The East and West India Docks and Birmingham Junction Railway Company v. Gattke* (a) it was held that a sheriff's jury, summoned under sect. 68 of The Lands Clauses Consolidation Act, 1845, by a party who alleged that his lands had been injuriously affected, had jurisdiction to decide upon the title to compensation as well as upon the amount of it. *The Sutton Harbour Improvement Company v. Hitchins* (b) assumes the same principle. It would be very inconvenient if the liability, and the amount of compensation consequent upon such liability, were to be tried by two distinct tribunals. The objection really is only to the order of proceeding. The Commissioners, upon any view, ought to have appeared before the arbitrator.

Lord CAMPBELL C. J. I am of opinion that this rule should be discharged. The mandamus is sought for to enforce an award. We are to see whether the award be valid in law. To be valid, it must be within the provisions of stat. 11 & 12 *Vict. c. 112. ss. 69., 70.* Those sections point out a particular case in which

(a) 20 *L. J. N. S. Chancery*, 217.(b) 21 *L. J. N. S. Chancery*, 73.

there is to be an arbitration: and it seems to me that this case is confined, expressly and anxiously, to questions merely of amount. Sect. 69 begins with enacting that full compensation shall be made. If it stopped there the remedy would be either action or mandamus; the words, so far, impose the duty, but say nothing as to remedy. What follows them? Are there any words that embrace questions of liability? It seems to me that there are not; but that the words which do follow are confined to disputes as to quantum. Therefore, as to all other disputes, the statute leaves us in the same position as if the later words were omitted. We ought, as a general rule, to construe words according to their natural sense. If indeed that sense led to an absurdity, we might strain the words rather than impute absurdity to the Legislature. But here I think that the natural sense leads to a very reasonable result. An arbitration is a very appropriate proceeding where the question is merely one of amount; it is more convenient than action or mandamus. That case therefore might well be the one contemplated by the Legislature. The natural sense of the words, therefore, leads, not to an absurdity, but to a very reasonable result. As to the case in the Court of Chancery, it is not shewn to my satisfaction that the Lord Chancellor was giving any opinion on the question now raised. If that were shewn, still, in spite of the very great respect which I feel for any opinion expressed by him, I should hold myself bound by the plain and simple interpretation of the statute itself. With respect to the suggestion of Mr. *Bramwell*, that the Commissioners ought to have appeared at the reference, I consider it quite untenable. The pro-

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ceeding being unwarranted, they were not bound to notice it.

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WIGHTMAN J. I am of the same opinion. The question turns entirely upon the construction of stat. 11 & 12 *Vict. c. 112*. It is safer to found our opinion on that, than to rely upon analogies drawn from other Acts, which may differ in their object, or be liable to be distinguished from the present. Sect. 69 enacts that compensation be given to all persons sustaining damage; and, in the particular case of a dispute as to amount, refers the amount to arbitration. That is compulsory on the Commissioners; for, if they refuse to appoint an arbitrator, the other party may do so alone. But that is confined to disputes as to amount: the question here is of liability. That may be a very grave question, and is to be determined by the regular tribunals: but the amount may safely be left to an arbitrator. The present proceedings are, at least, premature; and the rule should be discharged.

ERLE J. The question before us substantially is as to the jurisdiction of the arbitrator under sect. 69. That is conferred only in questions of amount. Sect. 69 is divided into two parts: the first part imposes a liability to compensate where damage is sustained: whether any such damage has been sustained, is a question which may be tried by mandamus or perhaps by action. Cases decided upon other Acts ought not to bind our judgment as to this. But, in my opinion, sect. 68 of The Lands Clauses Consolidation Act, 1845, does give the power of referring to the ordinary Courts the ques-

tion whether lands have been injuriously affected. It is true that, where the inquisition jury has found that no damage whatever has been done, as a mere question of amount, the Courts will sustain such finding: that, however, is a different thing from allowing them to determine whether, whatever the amount be, a party is or is not liable for it.

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CROMPTON J. I am also of opinion that the applicants for a mandamus in this case have taken a wrong course. It is quite clear that the arbitration is given only where the quantum of compensation is in dispute. To go to an arbitrator for the purpose of determining a question of liability is what the Legislature never thought of directing. A mandamus should have issued requiring the Commissioners to make compensation, and concur in appointing an arbitrator to determine the amount. I agree with my brother *Erle* that sect. 68 of the Lands Clauses Consolidation Act, 1845, does not enable a sheriff's jury to try a question of liability. Non-liability would have been a good return to the mandamus; and the question of liability would then have been properly raised.

Rule discharged.

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Saturday,
April 16th.

The QUEEN against JOHN THWAITES.

Joseph C., a person entitled to vote at municipal elections, was, by mistake, entered on the Burgess roll as James C. He voted by the name of James C. On motion for quo warranto, the vote was objected to, in the rule, on the ground that C. was not entitled to vote, and had fraudulently personated a person entitled to vote.

Held, that neither objection was sustained.

And *semble* that, if the objection in the rule had been that C. had voted by a wrong name, and was not rightly entered in the Burgess roll, this objection could not have been sustained, but that the misnomer would have been cured under sect. 142 of stat. 5 & 6 W. 4. c. 76.

SIR F. THESIGER, in last term, obtained a rule calling on the defendant to shew cause why an information in the nature of a Quo Warranto should not be exhibited against him, to shew by what authority he claimed to be councillor of the borough of *Blackburn* in *Lancashire*: on the grounds:

"1st. That the said *John Thwaites* was not, at the time of his election as one of the councillors for *Saint John's Ward* in said borough, on the 1st *November* 1852, qualified to be a councillor for the said ward.

"2d. That the said election of said *J. T.* is void on account of the reception of votes, at the said election for the said *J. T.*, from persons who were not entitled to vote in said election, or who fraudulently personated persons who were entitled in the said election.

"3rd. That the said election of the said *J. T.* is void on account of the reception, at said election, of votes for the said *J. T.* from persons who had been bribed to vote, in the said election, for the said *J. T.*, or who were, after having voted for the said *J. T.*, bribed and rewarded for having so voted."

From the affidavits in support of the rule it appeared that on 1st *November*, 1852, an election of two councillors took place for *St. John's Ward*, in the borough of *Blackburn*. There were four candidates; and the result of the poll was declared to be as follows:

<i>Thwaites</i>	.	.	.	369
<i>Briggs</i>	.	.	.	358
<i>Forrest</i>	.	.	.	355
<i>Hannah</i>	.	.	.	352;

giving to *Thwaites* a majority of 17 over *Hannah*. To this majority the objections stated in the rule were raised. The votes objected to were all given for both *Thwaites* and *Forrest*, so that the practical question was whether it could be shewn that *Thwaites* had not a majority above *Hannah*. The objection on the first ground was abandoned on the argument. The objection on the second ground comprehended eleven votes; the objection on the third ground comprehended seven.

Of the eleven votes objected to on the second ground it was admitted that there were five which had been given in the names of voters who had died before the day of election; and these votes were given up by the counsel opposing the rule. The question therefore as to this objection turned upon six votes, as to which it was assumed by counsel, and by the Court, that the circumstances were essentially the same, so that the determination as to any one of them would decide as to all six (*a*). As to one of these votes the facts appeared to be as follows.

(*a*) The majority declared having been 17, and this having been lowered, by the 5 votes which were abandoned, to 12, it became necessary, in order to destroy the majority, to shew that there were 12 bad votes given: and, as only 7 were objected to on the third ground, it was necessary to shew that at least 5 of the 6 votes to which the argument on the second ground related were bad. The Court having held that these 6 were all good, it became unnecessary to decide as to the 7 votes objected to on the third ground. As to these, it was contended that the affidavits shewed only that money was given after the election, and therefore that there was no case of giving money with a view of influencing the vote. Lord Campbell C. J., however, pointed out that, had these votes been material, the rule could not have been discharged upon such ground, inasmuch as the giving of money after the election might furnish evidence from which a jury might be entitled to infer a contract prior to the election. The arguments and judgments as to the third ground are not further noticed. *Lord Huntingtower v. Gardiner* (1 B. & C. 297) and *Rex v. Plympton* (2 Ld. Raym. 1377) were referred to.

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The following paper was given in.

“Borough of *Blackburn*.

“I, the undersigned *James Cowall*, being a burgess entitled to vote in the election of councillors for *St. John's Ward* in the borough of *Blackburn*, in the county of *Lancaster*, do hereby vote for Doctor *William Forrest* of *Saint John's Place*, gentleman, *John Thwaites* of *Cleaver Street*, Brewer, to be councillors of the said borough of *Blackburn* for the said ward. Dated the 1st day of *November*, one thousand eight hundred and fifty two.

“Signed *James Cowall*. { Rated on the burgess roll for
House *Courtfold* in the
same ward.”

The entry in the Burgess roll from 1st *November* 1852 to 1st *November* 1853 was: “No. 200. *Cowall James*. House, *Courtfold*.” It was deposed that, on 1st *November* 1852, no person of the name of *James Cowall* occupied any house in *Courtfold*; and that, upon inquiry, it could not be ascertained that any person of that name had ever done so. That the voting paper had been given in by *Joseph Cowall*, of *Little Harwood*, near *Blackburn*.

In answer, *Joseph Cowall* deposed that, for fifteen years and upwards previous to *February* 1852, he resided in a dwelling house in *Courtfold*, and was rated and paid rates in respect thereof: that, about *February* 1852, he quitted that house and went to reside at *Little Harwood*. That he was the person whose name was in the burgess roll from 1st *November* 1852 to 1st *November* 1853, as “Number 200. *Cowall James*. House, *Courtfold*.” That his name was so entered by mistake as *James Cowall* instead of *Joseph Cowall*; and that there had never been any other person named *Cowall*, to his knowledge,

in *Courtfold*. That he had delivered in the voting paper referred to in the affidavits in support of the rule.

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Watson and *Boden* now shewed cause. These six cases are not cases of personation at all. The parties voting had a right to vote, and were registered; but they voted under a description which was wrong, and which had been entered in the burgess roll by mistake. These are all cases of misnomer within stat. 5 & 6 W. 4. c. 76. s. 142. That section enacts, among other things, that "no misnomer or inaccurate description of any person, body corporate, or place named in any schedule to this Act annexed, or in any roll, list, notice, or voting paper required by this Act, shall hinder the full operation of this Act with respect to such person, body corporate, or place, provided that the description of such person, body corporate, or place be such as to be commonly understood." In the present case there could be no doubt that the description of each person voting under a wrong name was still such as to be "commonly understood." *Joseph Cowall* of *Little Harwood* had formerly resided at *Courtfold*, and at the time of the election was improperly described in the burgess roll as *James Cowall* of *Courtfold*, instead of *Joseph Cowall* of *Little Harwood*. It is agreed that there is no such person as *James Cowall*: all, therefore, that *Joseph Cowall* did was to vote under a description intended to designate himself, which was certainly inaccurate, but which did not belong to any one else. That is clearly not a personation; for nobody is personated: he does not assume to be another than himself, but only adopts the incorrect description of

1853. himself. The voting paper, wrongly drawn up as it was, was still intended for the person who actually used it; and all that person did was not to correct the error.

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Sir *F. Thesiger* and *J. A. Russell*, *contrà*. The cases in question are clearly not mere cases of misnomer. A misnomer is where a mistake occurs with respect to a name; here there has been a wilful misrepresentation; the parties have knowingly voted under names which were not their own. Such votes are not receivable; nor is the irregularity cured by sect. 142: *Joseph Cowall* could not be "commonly understood" to be *James Cowall*. The test of the applicability of sect. 142 to a defect in a paper under sect. 32 must be the same as that touching the sufficiency of an objection under sect. 17: namely, whether the paper "gives all the information which the Legislature intended to be given;" *Regina v. Mayor of Harwich (a)*. Sect. 18 provides for the annual revision and correction of the burgess list. And, though the errors of description in the present case were not corrected at such annual revision, yet, if the parties had tendered their votes under their right names, it might probably have been right to receive the votes. Sect. 142 might then have applied. But it is clear, by sect. 32, that each voting paper given in must be "signed with the name of the burgess voting:" the fact of there being no person of the description under which the vote is given does not make the vote the less a misrepresentation. Moreover, by sect. 34, the voter is to be asked, at the

(a) *Antè*, p. 617.

time of his voting, "are you the person whose name appears as *A. B.* on the burgess roll now in force for this borough," &c.? How can a voter, voting under a description which applies to no one person more than to another, answer this question in the affirmative? The objection could be taken in no other form than that which appears in the rule: the only inference which could be drawn, from the fact of the name of *James Cowall* being signed by a person not bearing that name, was that the person signing represented himself as *James Cowall*: and that was a personation. At any rate, it is a question for the jury whether there was such an intention.

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LORD CAMPBELL C. J. If we suppose the votes objected to on the ground of bribery to be struck out, there is still a majority unless the objections as to personation can be sustained. The question therefore is, whether the affidavits raise a question of personation for a jury: that is the way in which the objection was put when the rule was moved for; and the rule is framed accordingly. It appears that there are six persons, all on the burgess list, and all entitled to vote; but that they voted under wrong descriptions. That, in my opinion, shewed no more than a case of misnomer within sect. 142, and therefore did not invalidate the votes. The rule states that they were not "entitled to vote." But, on the affidavits, it is not disputed that the persons who did vote were entitled to vote; only there appears an irregularity in the mode of voting. It is said that the question, whether or not they swore falsely, is for a jury. But the affidavits on the two sides are not contradictory, and therefore do not raise such a question.

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As regards the misnomer, there is no ground for making the rule absolute; the rule being framed on the ground that the parties were not entitled to vote. Even if the specific objection had been made, that they voted under a description wrongly put down in the burgess roll, that objection could not have invalidated their votes. Suppose a person named *James* had been put down in the roll as *Jem*, and had been known as *Jem* throughout the borough, I do not say that he must have signed the name *Jem*, but surely he might have done so. Setting aside therefore the objection which arises on the framing of the rule, I think the votes are good. *Thwaites*, therefore, has a majority; and the rule must be discharged.

WIGHTMAN J. I am of the same opinion. If the votes said to be cases of personation are to be retained, *Thwaites* is elected. Now it is admitted that these votes were given by parties entitled to vote, but who voted under a wrong description. In short, the right man has voted, but has voted under a wrong name. This is a case which to me seems clearly to be cured by sect. 142. The second question in sect. 34 might, I think, be truly answered by *Joseph Cowall* in the affirmative: he is the person whose name is on the list, though there is an error in entering the name; which constitutes a case under sect. 142. The votes are therefore good votes; and the rule must be discharged.

ERLE J. I also think that this rule should be discharged. These six persons, entitled to vote, have, without fraud, voted under a wrong name. Such a mistake, in this respect, would clearly be within the meaning of sect. 142. The six votes are therefore good.

CROMPTON J. The rule brings forward two sets of cases; cases of personation, and cases of bribery. In order to make the rule absolute, both sets of cases must be established. The proof of the first set, in my opinion, fails entirely. The objectors are bound by the rule, which alleges only that the parties voting were not entitled to vote, and had fraudulently personated persons entitled to vote. Neither want of title or personation is shewn. The ground insisted upon is altogether different: there is nothing in the affidavits to shew that the voters might not be known by the names under which they were registered and have voted. Even supposing the rule more formally drawn, so as to raise the objection insisted upon, I should be inclined to say that it was the intention of the Act that the burgesses should vote by the names which appear on the burgess list. The second question to be put, under sect. 34, is, whether the voter is the person whose name appears in the list, and whether he is the person whose name is signed. He is not to be asked whether the name which he has signed is his real name.

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Rule discharged.

The QUEEN *against* The Recorder of SHREWSBURY. *Wednesday, April 20th.*

MANDAMUS to *Charles Harwood Esq.*, Recorder of the borough of *Shrewsbury*, in *Shropshire*. The writ suggested: That, at the General Quarter Sessions

Under stat. 4 & 5 W. 4. c. 76. s. 79. and 11 & 12 Vict. c. 31. s. 9., the sessions have no jurisdiction to hear an appeal against an order of removal, where notice of chargeability has not been served on the parish to which the removal is ordered.

Before stat. 4 & 5 W. 4. c. 76. there was no right of appeal (except in the case of suspended orders) till the actual removal.

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of the peace holden at the borough of *Shrewsbury*, on 12th *July* 1852, an appeal theretofore entered by and on behalf of the Churchwardens and overseers of the poor of the parish of *Shawbury*, in *Shropshire*, against an order under the hands and seals of two justices in and for the borough of *Shrewsbury*, bearing date 23d *February* in the year aforesaid, for the removal of *George Harris* and *Elizabeth* his wife, from the parish of *St. Chad* in the said borough to the said parish of *Shawbury*, came on to be heard before the Recorder; and that the Recorder, by and before whom such sessions were then holden, was then and there required, on the part and behalf of the churchwardens and overseers of *Shawbury*, to hear and determine the merits of the said appeal: but that he, not regarding &c., did then and there absolutely neglect and refuse to hear and determine the said appeal, and did then and there dismiss the same without hearing and determining the merits thereof, and had not, at any time since, heard or determined the same, in contempt &c., to the great damage and grievance of the inhabitants of the parish of *Shawbury*. Whereupon they have humbly besought us &c. The writ then commanded the Recorder, without delay, to enter, or cause to be entered, continuances upon the said appeal from session to session, to the next general quarter sessions of the peace for the borough of *Shrewsbury*, and, at such next general quarter sessions, to proceed to hear and determine the merits of the said appeal; or to shew cause &c. Teste, 25th *November*, 16 *Victoria*.

Return. That the order, under the hands and seals of *Thomas Girdler Gwyn* and *Edward Hughes*, Esquires, two of Her Majesty's keepers of the peace and justices

in and for the borough of *Shrewsbury*, mentioned and referred to in the writ, was made by them, the said *T. G. G.* and *E. H.*, on 23d *February* 1852, the day of the date of the same order, as in the writ mentioned. That a copy of the order was served on and delivered to one of the overseers of the parish of *Shawbury*, in the writ mentioned, on 24th *February* 1852. That a notice of appeal against the order, containing a statement of the grounds of such appeal, was served on the churchwardens and overseers of the parish of *Saint Chad*, in the writ mentioned, on 16th *March* 1852, by and on behalf of the churchwardens and overseers of *Shawbury*, the same being a notice of appeal for the next general quarter sessions of the peace to be holden in and for the borough of *Shrewsbury*. That the appeal against the order was entered and came on to be heard at the next general quarter sessions of the peace in and for the borough of *Shrewsbury* holden on 12th *July* 1852, in the writ mentioned. That no notice in writing of the said *George Harris* and *Elizabeth* his wife, the paupers named in the order made for their removal and in the writ mentioned, or of either of them, having become, or at the time of making the said order being, chargeable to or relieved in the parish of *Saint Chad* was, with the said order, at the time of the sending and service of the same on the said 24th *February* 1852, sent to or served upon the said churchwardens and overseers of *Shawbury*: and no such notice of chargeability or relief has at any time been sent to, or served upon, the churchwardens and overseers of *Shawbury*. That no statement in writing of the grounds of removal, including the particulars of the settlement or settlements relied upon in support of the removal, and of the said

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order, accompanied the said order at the time of the sending and service of the same on the said 24th *February* 1852. And no such statement of the grounds of the removal, and of the particulars of the settlement or settlements relied upon &c., has at any time been sent to or served upon the churchwardens and overseers of *Shawbury*. That, at the time of the said appeal against the order coming on to be heard at the quarter sessions of the peace in and for the borough of *Shrewsbury*, on 12th *July* 1852, no removal of the said *George Harris* and *Elizabeth* his wife, or of either of them, had been made or attempted to be made to the parish of *Shawbury*, by or on behalf of the churchwardens and overseers of the parish of *Saint Chad*, or by virtue of the order: and no such removal has at any time, since the said appeal, been made or attempted to be made. That, according to the rule and practice of the said general quarter sessions of the peace in and for the borough of *Shrewsbury*, it was requisite to the hearing and determination of the merits of the appeal that the case on behalf of the said churchwardens and overseers of the parish of *Saint Chad*, being the respondents in the appeal, should first be stated, and evidence thereupon adduced of the ground or grounds of removal relied upon in support of the order: and that, on the hearing of the appeal, the churchwardens and overseers of the parish of *Saint Chad* could not legally have gone into or given evidence of any such ground or grounds of removal. "Wherefore I, the said Recorder of the borough of *Shrewsbury*, did dismiss the said appeal against the said order so brought on to be heard at the general quarter sessions" &c., as in the writ mentioned; "notice of the said appeal having been served, and the

said appeal brought on to be heard at the said general quarter sessions of the peace, before, as aforesaid, any notice in writing of the chargeability of the said *G. Harris* and *Elizabeth* his wife, or either of them, to the said parish of *Saint Chad* in the writ mentioned, and any statement in writing of the grounds of the removal of the said *G. Harris* and *Elizabeth* his wife, including the particulars of the settlement or settlements relied upon in support of the said removal, had been sent to or served upon the churchwardens and overseers of the parish of *Shaobury* in the writ mentioned. And, for the causes aforesaid, I do humbly return that I have not proceeded, and cannot and ought not to proceed, to hear and determine the merits of the said appeal, as by the writ" &c.

Demurrer. Joinder.

Pashley, for the Crown. The return is founded on the want of service of notice of chargeability and grounds of removal. But that affords no reason for not hearing the appeal: on the contrary, the appeal should have been heard; and the objection, if supported, should have been allowed on the hearing. That want of notice of chargeability constitutes a good ground of appeal was decided in *Regina v. Brixham* (a); and it follows that it furnishes no ground for refusing to entertain the appeal. On the authority of that case, the rule for the present mandamus was made absolute (b). No inconvenience arises from the practice as settled in *Regina v. Brixham* (a): if the order be confirmed on the objection, the decision will not bind the parties on an appeal upon the

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(a) 8 A. & E. 375.

(b) *Regina v. Recorder of Shrewsbury*, 1 Low. & M. 165.

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merits. On the other hand, it may be important to have the order quashed, so as to make a new order necessary, inasmuch as in the mean time the chargeability may cease. The right of appeal is given to the parties "who think themselves aggrieved by any such judgment" of the two removing justices, by stat. 13 & 14 C. 2. c. 12. s. 2.; by stat. 3 & 4 W. & M. c. 11. s. 9., to any persons "aggrieved by any determination;" and, by the same statute, sect. 10, to "all such persons who think themselves aggrieved with any such judgment of the said two justices." The persons upon whom the order is made and served are the persons aggrieved by the judgment and determination. And in *Rex v. Monks Risborough* (a) it was held that the "next quarter sessions," in stat. 13 & 14 C. 2. c. 12. s. 2., means next after the service of the order. Stat. 4 & 5 W. 4. c. 76. s. 79. introduces the necessity of the service of notice of chargeability: the actual removal cannot take place (except by consent) till twenty one days after notice of chargeability has been sent, together with a copy of the order and the examinations. But that does not prevent the order itself from being the "judgment" or "determination" by which the parish is aggrieved: and, under that statute, it has been held that either the order or the actual removal might be treated as the grievance. Then stat. 11 & 12 Vict. c. 31. s. 9. merely substitutes the grounds of removal for the examinations.

C. H. Scotland, contra. The right of appeal is created by statute; and the jurisdiction exists only where it is placed by statute. *Regina v. Brizham* (b) is indeed

(a) 2 Bott, 744, pl. 954 (6th ed.).

(b) 8 A. & E. 375.

adverse to the appellants, but only by implication: the point now in discussion was not taken there. The appeal is given, by stats. 13 & 14 C. 2. c. 12. s. 2. and 3 & 4 W. & M. c. 11. ss. 9., 10., to the parties aggrieved: and, as to those statutes, the only question is, what constituted the grievance. Now, though sometimes the service of order of removal was looked to for this purpose, that was only because it was assumed that the removal and the service of the order would take place contemporaneously. The order of removal is called a "warrant," in stat. 13 & 14 C. 2. c. 12. s. 1.; and, like other warrants, it was shewn at the time of execution. But till the actual removal there was no grievance; and, when a sessions intervened between the order and the removal, the appeal lay to the sessions next after the removal; *Rex v. Norton (a)*, *Rex v. St. Marylebone (b)*. But, as decided in the case last mentioned, stat. 35 G. 3. c. 101. s. 2., introduced, in the case of a suspended order, a grievance which accrued immediately upon the making of such order, and without removal, by reason of the costs during the suspension. Stat. 49 G. 3. c. 124. s. 2. enacted: "that when the execution of any such order of removal shall be suspended, the time of appealing against such order shall be computed according to the rules which govern other like cases from the time of serving such order, and not from the time of making such removal under and by virtue of the same." This does not recognize a computation from the time of the service of the order, or any time but the removal, in the case of orders not suspended, but provides merely that the time, though reckoned from different points in the two cases, shall be computed in the same way. [Lord

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(a) 2 Str. 831.

(b) 13 East, 51. 54.

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Campbell C. J. Did not service of the order furnish evidence of settlement, if acquiesced in?] It could do so only if there was the power to appeal; so that the question is still the same. Stat. 8 & 9 W. 3. c. 30. s. 6. enacts that appeals shall be prosecuted only at the sessions for the county, &c. wherein the parish, &c., "from whence such poor person shall be removed, doth lie," evidently assuming that in all cases of appeal there will have been an actual removal. Then the question is as to the changes produced by later Acts. Stat. 4 & 5 W. 4. c. 76. s. 79. gives a power of appeal, before removal, if notice of appeal be given within twenty one days after service of a notice of chargeability accompanied by a copy of the order; but here that notice has not been given. So, by sect. 84, the expences are payable, by the parish to which the pauper is removed, only from the service of notice of chargeability. The object of this alteration was to save the inconvenience of a removal which might possibly, on appeal, turn out to be unwarranted: that explanation is given by *Williams J.* in *Regina v. The Justices of Herefordshire (a)*. In *Regina v. Justices of Salop (b)* it was held that, even after stat. 4 & 5 W. 4. c. 76., there was no grievance till actual removal, and therefore that an appeal to the sessions next after the removal was early enough. That was held to be erroneous, so far as the reasoning went; it being afterwards decided that, since the statute, both the order and the removal were distinct grievances, and that the time of appeal might be reckoned from either; *Regina v. The Justices of the West Riding of Yorkshire (c)*, *Regina v. The Recorder of Leeds (d)*. But it was taken for granted, in all these cases, that, before the statute, there was no

(a) 8 Dowl. P. C. 638. 645.

(b) 6 Dowl. P. C. 28.

(c) 2 Dowl. & L. 488.

(d) 8 Q. B. 623.

grievance till there was actual removal. Then stat. 11 & 12 *Vict. c. 31. s. 9.* does more than substitute the grounds of removal for the examinations: it provides in itself a complete regulation of the practice: and it enacts that no appeal shall be allowed if notice thereof be not given within twenty one days after the notice of chargeability and statement of grounds of removal shall have been sent, unless within twenty one days a copy of the depositions has been applied for, when fourteen days are allowed for notice of appeal, reckoned from the sending of such copy. This enactment does not even mention the service of the copy of the order. Therefore, at no time has there been a right of appeal without either an actual removal or a service of notice of chargeability; and now there is none without service of such notice.

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Pashley, in reply. Stat. 11 & 12 *Vict. c. 31. s. 9.* varies from stat. 4 & 5 *W. 4. c. 76. s. 79.* merely in the description of documents which are to be sent: the question therefore is still as at the time of the decision of *Regina v. Brizham (a)*: and that case has not been distinguished from the present. The return does not shew that the objection was taken in this case. The other decisions under stat. 4 & 5 *W. 4. c. 76.*, which have been cited on the other side, relate merely to the question at what sessions an appeal should be heard, not to the general question of jurisdiction: and, whatever extrajudicial remarks may have been made in those cases, they decide only that both the service of the order and the actual removal are grievances giving the right to

(a) 8 *A. & E.* 375.

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appeal. It is true that, under the old law, the order of removal was almost always served at the time of the removal: but it cannot be inferred from this that the service of the order was no grievance except as accompanying the removal, any more than that the removal was no grievance except as accompanied with the service of the order. In *Road v. North Bradley* (a) the rule assumed was that the appeal was to be to the sessions next after the order of removal.

Lord CAMPBELL C. J. The question really is whether *Regina v. Brisham* (b) is to be upheld or overruled. According to that decision, this return is bad; for it would be an absurdity to say that what was a good ground of appeal took away the jurisdiction to hear the appeal. That would be preposterous. The question therefore is, whether the non-service of notice of chargeability is a ground of appeal. It seems to me that it is not. The appeal is given where there is a grievance: that, I think, is the principle upon which all the statutes are founded. As to stat. 13 & 14 C. 2. c. 12., the result of the decisions referred to by Mr. Scotland is that there was no appeal under that Act till there was an actual removal. I find indeed no express decision that no appeal lay upon the mere service of the order: but that appears to me to follow by implication. At all events, the appeal lay by reason of the removal; and the Courts, in so deciding, seem to intimate that there was no grievance till the pauper was taken to the appellant parish together with the order. We then have an express decision that, in the case of suspended orders, under stat. 35 G. 3.

(a) 2 Str. 1162.

(b) 8 A. & E. 375.

c. 101. s. 2., the order is itself a grievance: but there the statute directed the payment of expenses which accrued from the service of the order, thus creating a grievance at that time. Then stat. 4 & 5 W. 4. c. 76. s. 79. prevents a removal till twenty one days after service of notice of chargeability accompanied by a copy of the order. The service of the order is a mere nullity without the service of the notice of chargeability: till this service, there is no power of removal: and the time for appealing dates from the service. That being so, there is no grievance until there is notice of chargeability, and, there being no notice, there is no right of appeal. This is consistent with all the decisions except *Regina v. Brizham (a)*. That case is certainly irreconcilable with the view which I take: but I think we cannot sustain the decision. It seems too absurd to allow an appeal where there is no grievance: and the effect would be simply to produce a hearing which would not decide the matter in controversy between the parishes, and would only make it necessary to obtain a fresh order. It seems to me therefore that we must overrule *Regina v. Brizham (a)*; and then there remains nothing which conflicts with our view.

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ERLE J. (b). The appeal was dismissed on the ground that no right of appeal existed. That brings us to consider what the right of appeal is. We must see to what conditions it is subject: and, if those conditions are not complied with, we must hold that it does not exist. In the last statute, 11 & 12 Vict. c. 31. s. 9., it is enacted that, unless notice of appeal be given within twenty one days

(a) 8 A. & E. 375.

(b) *Wightman J.* had left the Court.

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after notice of chargeability shall have been received (as I read the statute), or fourteen days after sending a copy of the depositions, no appeal shall be allowed. Any one, therefore, desirous of appealing is to see whether this condition has been complied with: in other words, whether the documents have been sent; when they have not, the time during which notice of appeal is to be given does not begin to run. To my mind, the question would have been the same before this statute: I must say that I do not concur in the decision of *Regina v. Brizham* (a). The history of the right of appeal has been very clearly traced by Mr. Scotland. The removal was originally the term at which the grievance accrued; and different statutes have been passed since stat. 13 & 14 C. 2. c. 12., all confirmatory of the view that up to stat. 4 & 5 W. 4. c. 76. the removal was that which constituted the grievance and gave the right of appeal. The intention of sect. 79 of that statute was to put an end to actual removal till the alleged settlement had been acquiesced in or affirmed upon appeal. Therefore the removal was suspended for twenty one days after the notice of chargeability should be served. This produced a double right of appeal: the service of the notice and the actual removal. Then followed stat. 11 & 12 Vict. c. 31. s. 9. The law may be carried out on the principle indicated by Mr. Justice Williams in *Regina v. The Justices of Herefordshire* (b): I am sure that convenience suggests the principle which we are affirming. On the opposite view, the appellant might succeed without the decision of any question really in controversy, so as only to render it necessary to obtain a fresh order.

(a) 8 A & E. 375.

(b) 8 Dowl. P. C. 645.

Our view therefore is corroborated by the convenience of the case.

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CROMPTON J. When this case was before me in the Bail Court (a), I was much struck with Mr. Scotland's argument, and did not see how it was to be answered. But I felt bound by *Regina v. Brizham* (b). I rather invited the parties to contest the question in the full Court; and the argument here has convinced me that up to stat. 4 & 5 W. 4. c. 76. there was, in the case of orders not suspended, no grievance till actual removal, and since that Act none without service of notice of chargeability. And the matter is made still clearer by stat. 11 & 12 Vict. c. 31. s. 9., which forbids the allowance of an appeal unless notice of it has been given within a certain time after notice of chargeability.

Judgment for defendant.

(a) *Regina v. Recorder of Shrewsbury*, 1 Low. & M. 105.

(b) 8 A. & E. 375.

FROMANT *against* HENRY ASHLEY and MARTHA, *Thursday,*
his Wife. *April 21st.*

ASSUMPSIT for goods sold and delivered to the female defendant, while sole. Plea: Non assumpsit.

The plaintiff served the defendants with the summons indorsed with particulars of demand, under stat. 15 & 16 Vict. c. 76. s. 25. These particulars were:

Quare, whether, where the writ of summons in an action is indorsed with particulars under sect. 25 of The Common Law Procedure Act,

1852 (15 & 16 Vict. c. 76.), the plaintiff, without leave of a Judge, may deliver fresh particulars with the declaration, and proceed thereon.

At any rate, such a proceeding is no more than an irregularity which is cured by the defendant pleading over.

1853.	" Goods (haberdashery) sold to defendant's	£	s.	d.
FROMANT	testator, <i>James Colebank</i>	-	-	20 18 0
V.	1849. <i>Dec. 12 to April 25, 1850: Goods</i>	-	24	4 4
ASHLEY.	1850. <i>April 26 to July 8: Goods</i>	-	12	10 2
	1850. <i>July 9 to Octr. 11: Goods</i>	-	13	0 6
				<hr/> 70 13 0
	By Cash, 25 <i>Sept.</i> 1850	-	7	5 11
				<hr/> 63 7 1

The defendants having appeared to this writ, the plaintiff delivered a declaration, dated 5th *November*, 1852, to which fresh particulars were annexed, and which were as follows:

" This action is brought to recover the sum of 63*l.* 7*s.* 1*d.*, the balance due to the plaintiff for the goods sold and delivered to the defendant *Martha*, before her marriage with the defendant *Henry*; the full particulars whereof exceed three folios, and have been delivered to the defendant. Also the like amount on account stated. Above are the particulars of the plaintiff's demand. Dated the 5th day of *November*, 1852."

On the trial, before Lord *Campbell* C. J., the counsel for the defendants insisted that the plaintiff was confined to the first particulars. The Lord Chief Justice was of this opinion; but he offered to adjourn the case, in order to allow time for amendment of the particulars. This offer was declined on the part of the plaintiff: and he offered no evidence upon the first particulars; whereupon he was nonsuited.

In last term, *Udall* obtained a rule *Nisi* for a new trial.

Watson and *Creasy* now shewed cause. The plaintiff was bound by the particulars indorsed on the writ, under stat. 15 & 16 *Vict. c. 76. s. 25.*, until other particulars

should be delivered by order of a Judge. The section enacts that in such a case "the indorsement shall be considered as particulars of demand, and no further or other particulars of demand need be delivered, unless ordered by the Court or a Judge." [Lord Campbell C. J. The words "need be" rather suggest that the plaintiff may deliver other particulars if he chooses.] Sect. 25 exonerates the plaintiff from delivering the particulars with the declaration: if there are to be particulars delivered with the writ, to which the defendant appears, having a good defence to that claim, and afterwards the claim is changed by the delivery of fresh particulars to which he may have no defence, the defendant will be put to useless expense, and the object of the Legislature will be to a great degree defeated. The plaintiff may thus try an experiment for obtaining his unjust claim and protect himself by his just claim. And in this case the same amount precisely is claimed in the two particulars. [Lord Campbell C. J. I think you will not make much of that fact.] The consequences of not appearing are very penal, under sect. 27. [Coleridge J. In 2 *Chitty's Archbold*, 1257 (a), it is said: "If the particulars delivered be incorrect, the plaintiff cannot cure the defect by delivering a fresh particulars, or otherwise, without a Judge's order, or by consent:" but the authority cited for that is *Brown v. Watts* (b), where the particulars were changed after issue joined.] The delivery of particulars, under the old practice, was a proceeding in the cause, and is at least as much so now. [Coleridge J. Sect. 25 should be construed together with Rule 19 of the *Reg. Gen. Hil. 16 Vict.* (c).] That provides for the case where

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FROMANT
V.
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(a) 8th edition. (b) 1 *Taunt.* 353. (c) *Post*, Appendix, I. p. v.

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 FROMANT
 V.
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there has been no indorsement of particulars on the writ. The statutory character of the particulars is exhausted when there has been such an indorsement.

Udall, contra. Sect. 25 is an enactment intended to aid the plaintiff in the case of the defendant not appearing: if the defendant does appear, the plaintiff is not bound to adhere to the particulars indorsed on the writ. If, in such a case, the cause of action was finally fixed by the writ and indorsement, why should a declaration be delivered at all? [*Erle J.* If the declaration be otherwise superfluous, how do you make it more essential by adding particulars to it? Lord *Campbell C. J.* Whatever names you apply, in effect you vary your claim.] Writs are almost always now indorsed with particulars: is there to be an application at chambers in every case where the declaration does not exactly correspond with these particulars? For instance, must there be an application to warrant a count on an account stated, if the particulars indorsed do not mention such account? Rule 21 of *Reg. Gen. Hil. 16 Vict.* (a) regulates the time for pleading after the delivery of particulars, which therefore must mean particulars annexed to the declaration or delivered after declaring. The *Regulæ Generales* of *Hil. 16 Vict.* took effect, however, only from 11th *January 1853* (b): the particulars here were delivered before that day. But, under either practice, the object of the particulars is to shew what the declaration means, and to what the defendant has to plead. At the worst, this is but an irregularity; and the defendant has waived the objection by pleading over; *Wallis v. Anderson* (c). [*Coleridge J.* May not the last delivery of particulars

(a) *Post*, Appendix, I. p. vi.(b) *Ante*, p. 292.(c) *Moo. & M.* 291.

be a nullity?] The test of that, as pointed out by *Coleridge J.* in *Holmes v. Russel (a)*, "is to see whether a party can waive the objection." [*Erle J.* Can this objection be waived? Could the parties agree to treat an action for a debt as an action for a trespass?] The particulars are not part of the record. The acceptance of fresh particulars, as when the defendant assumes that the time for pleading runs from their delivery, is an implied admission that they are to be in the place of the old ones; *Jones v. Fowler (b)*. (He was then stopped by the Court).

Per *CURIAM (c)*. That case is in point.

Rule absolute.

(a) 9 *Dowl. P. C.* 487. 489. See *Garratt v. Hooper*, 1 *Dowl. P. C.* 28.

(b) 4 *Dowl. P. C.* 232.

(c) Lord *Campbell C. J.*, *Coleridge* and *Erle Js.* *Wightman J.* had left the Court.

DAVID HERBERT THACKERAY GRIFFIES WILLIAMS
and WATKIN LEWIS GRIFFIES WILLIAMS against
HERBERT DAVIES EVANS.

Thursday,
April 21st.

THE plaintiffs having sued the defendant on a claim by plaintiffs of one third part of certain tithes, and

E., being
seised in fee of
tithes and also
of lands, devised
the tithes

to his nephew *D.*, son of *H.*'s sister *A.*, for life; but, if *D.* should receive ecclesiastical promotion to a certain amount, then to *D.*'s brother *W.* for life; remainder to the uses expressed concerning his real estate. He made certain pictures &c. heir looms, directing the inventory thereof to be deposited with the deeds concerning his "real estates." He devised all his "real estate, of what nature or kind soever, and wheresoever situate," to his niece *M.* for life, remainder to her sons successively in tail, remainder to *W.* for life, remainder to his sons in tail, remainder over to other nephews in like manner. He bequeathed a legacy to his wife, on condition of her executing a deed binding her to receive an annuity from the person who should for the time being be in the possession of his "real estate, under the limitations aforesaid," in lieu of her taking possession of the hereditaments settled on her by way of jointure.

He executed two codicils, in which he changed the order of the parties named in the disposition of his will to succeed in the entail of his "estates real and personal;" and he declared "all the estates left and disposed of by my will," to be without impeachment of waste, with power to cut timber for repairs of "buildings on the estate."

By another codicil, he devised all his "real estates, of what nature or kind soever," to *H.*, son of *M.*, in strict settlement, and, upon failure of *H.*'s issue, devised all his "said real estates" as "mentioned in my said will," declaring that the devises in the codicil were to

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take effect "in precedence to the devises of my real estate contained in my said will;" and he appointed D. one of his residuary legatees.

Held that tithes were not, in the will, included under the words real estate, and that the specific devise of them therefore took effect. Also, that this specific devise was not revoked by the codicil last mentioned, the words "real estate" appearing to be there used so as not to include tithes.

one third of the remaining two thirds, or rent charges in lieu of tithes, and the defendant having appeared (a), it was ordered by *Coleridge J.* that the claim should be decided by this Court, upon a case which, so far as is material to the decision, was as follows.

Herbert Evans was, at the date and execution of his last will and testament hereinafter stated, and thenceforth continued, and was at the time of his death, seised to him and his heirs for an estate of inheritance in fee simple of and in one third part, and one third part of the remaining two third parts, of all the tithes, or rent charges in lieu thereof, arising and accruing within the several hamlets of *Rhyddlan, Issa Rhyddlan, Ucha Cowd, Rhivon, Brynman and Havodyrwyn*, in the parish of *Llanwenog* and county of *Cardigan*, and one third part of all the tithes, or the rent charges in lieu thereof, arising and accruing within the several hamlets of *Llanvaughan, Llechwedd, Esgerbygoer and Gwillim*, in the parish and county aforesaid, and which are the same tithes, parts or proportions of tithes, as are mentioned in the said testator's said will to be thereby devised, and of and in certain corporeal hereditaments of great value, consisting of a mansion house and demesne lands, called *Highmead*, situate within the same parish, and of other messuages, lands and tenements, situate in the counties of *Carmarthen, Cardigan and Pembroke*.

The said testator duly made and published his last will and testament in writing, and the several codicils thereto hereinafter stated. The will and codicils were respectively executed and attested, in such manner as required by law for passing freehold estates by devise. The material parts of the will were as follows.

(a) See The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76.)
s. 46.

"I direct all my just debts, funeral and testamentary expenses, to be fully paid and satisfied out of my personal estate not hereinafter specially bequeathed: and I hereby charge and make chargeable all my real estate with the payment of such just debts and expenses, in aid only of such personal estate. I give and bequeath" &c.: here followed a pecuniary bequest of 1500*l.* to an illegitimate son: "and this sum of 1500*l.* I hereby charge upon my freehold farm called" &c.: another 1500*l.* was also bequeathed to him on certain trusts then declared. "I give and devise unto the Reverend *David Herbert Thackeray Griffies Williams*, fifth son of my said sister *Anna Margaretta Griffies Williams*, and his assigns, all and every my shares, parts and proportions of and in the tithes yearly arising, growing and renewing within the said parish of *Llanwenog*, and the titheable places thereof, save and except the tithes yearly arising, renewing and increasing in, upon and from the demesne lands and hereditaments called *Highmead*; to hold the same, with the appurtenances, unto and to the use of the said *D. H. T. G. Williams* and his assigns, for and during his natural life, but subject to the proviso next hereinafter contained: that is to say: provided always, and the last aforesaid devise is upon this express condition, that, if at any time during his life the said *D. H. T. G. Williams* shall or may have or receive, from or by means of any ecclesiastical living or preferment, an annual income sum or sums of money amounting altogether, and clear of all payments and deductions whatsoever, to the sum of 400*l.*, then and from thenceforth the said last mentioned devise to him and his assigns shall cease and determine: and my said shares, parts and proportions of and in the said tithes shall go and

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be possessed in like manner by his brother *Watkin Lewis Griffies Williams*, a captain" &c., "for the period of his life only: then, and after the expiration thereof, to the several provisions and uses herein expressed and contained of and concerning my real estate. I do hereby will and direct that, and for that purpose bequeath, all and every the pictures, books, plate, furniture and effects of or usually in or about my mansion house at *Highmead* aforesaid shall be considered as or in the nature of heir looms, and pass with my said house in the same manner as if they were land or other real property appurtenant or appendant thereto, and shall accordingly continue annexed to my said mansion house, as long as the law will permit, and be inherited and enjoyed by the several persons who shall succeed to my real estate under or by virtue of the limitations of this my will; for so they passed to me. And I hereby devise and direct that proper inventories shall, immediately after my decease, be made and taken by my executrix hereinafter named of all the said pictures, books, plate, furniture and effects so bequeathed as heir looms as aforesaid, and signed by her, and a true and attested copy thereof be deposited with the writings and the deeds concerning my real estates, for the better information of the person or persons who shall from time to time succeed thereto. I give and devise all my real estate, of what nature or kind soever, and where-soever situate, subject to the payment of my just debts, funeral and testamentary expenses in aid of my personal estate as aforesaid, unto and to the use of my niece *Mary Anne Elizabeth Evans*, daughter of my late brother *Watkin Evans*, a captain" &c., "and her assigns, for and during her life; and, after the determination of that estate by any means in her lifetime, to the use of the

said *William Jones Evans* and the Reverend *William Jones*" &c. (to preserve contingent limitations); "and, after her decease, to the use of her first and other sons, and the heirs of his and their bodies according to priority of birth: and, for default of such issue, to the use of my nephew *Watkin Lewis Griffies Williams*, fourth son of my said late sister *Anna Margaretta Griffies Williams*, and his assigns, for and during his life, and after the determination" &c. (to preserve contingent limitations); "and, after the decease of my said last mentioned nephew, to the use of his first and other sons, and the heirs of his and their bodies, according to the priority of birth: and, for default of such issue" &c., to *Herbert (a) Vaughan* for life, remainder in tail as before; remainder to *Herbert Rice*, remainder in tail as before: remainder over, not material here. "I also give and bequeath unto my said wife *Elizabeth Evans* the sum of 500*L.*, to be paid her, her executors, administrators or assigns, by my executrix hereinafter named, within twelve calendar months next after my decease, without interest, upon this express condition that she, the said *Elizabeth Evans*, do and shall, by some good and sufficient deed or deeds or instrument or instruments in writing, bind herself to receive from the person who for the time being shall be in the possession of my real estate, under the limitations aforesaid, an annual sum of 500*L.* in lieu of herself taking possession of the hereditaments settled upon her, by way of jointure, by the settlement made upon our marriage or afterwards, for so long time as the said annuity of 500*L.* shall be regularly paid to her by half yearly payments. All the rest and residue of my personal estate and effects of

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what nature or kind soever I give and bequeath unto my said niece *Mary Anne Elizabeth Evans*." "Lastly, I appoint my said niece *Mary Anne Elizabeth Evans* executrix of this my last will and testament." Dated 11th *April* 1835.

The first codicil was not noticed in the argument.

The second codicil was dated 9th *October* 1838. By it, the devisor gave to *Elizabeth Evans*, for her life, certain houses &c. called *Highmead*, with land, provided she should reside there six calendar months in the year; otherwise the premises "to be dealt with according to the provisions laid down in my last will." "And, whereas in my last will I have placed my nephew *W. L. G. Williams* the first in the entail in my estates real and personal after his cousin *Mary Anne Elizabeth Evans*, now *Mary Anne Elizabeth Davies*, and her heirs male, and after the name in my will aforesaid of *W. L. G. Williams* so in entail placed I have named *Henry (a) Vaughan*," "and after the said *Henry (a) Vaughan* I have named in the said entail *Herbert Rice*," "I hereby alter and change the disposition in my will, in so far that the name of my nephew *Rev. D. H. T. G. Williams* shall come in and be in force in my will next to the name of his brother *W. L. G. Williams*; and this for all estates real and personal possessed by me in my own right."

The third codicil was dated 19th *November* 1839. By it, the devisor substituted his nephew, the *Rev. D. H. T. G. Williams*, as trustee in place of a person before appointed trustee: and he added: "All the estates left and disposed of by my will are hereby declared to be so left without impeachment for waste against every one in possession of the same, in due succession, each to be permitted to

cut and fell timber for repairs of all buildings on the estate when necessary."

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The fourth codicil was dated 2d *May* 1842. By it, the devisor gave certain annuities chargeable upon specified lands. "And, subject to the said several annuities, and to the remedies for the recovery thereof, I give and devise the said hereditaments to the uses hereinafter declared of and concerning my real estate. I give and devise all my real estates, of what nature or kind soever, subject, as to my freehold farms called" &c., "to the charge hereinafter contained, unto *Herbert Davies*, son of my niece *Mary Ann Elizabeth Davies*, wife of" &c., "for his life, with remainder, on the determination of his estate in his lifetime, to" &c. (to preserve contingent remainders); "with remainder to the first, second and every other subsequent son of the said *Herbert Davies*, successively according to seniority, in fee simple," with limitations dependent upon their attaining twenty one and having male issue: remainder to every son in succession of *Mary Ann Elizabeth Davies*, with limitations to their issue male, not now material: "and, on failure of such issue, then I give and devise all my said real estates in such manner as is in that behalf mentioned in my said will, hereby declaring it to be my will that the devises hereinbefore made shall take effect in precedence to the devises of my real estates contained in my said will. And I hereby direct that every person who shall become entitled in possession of my said real estates by virtue of the devises hereby made shall," within eighteen calendar months, endeavour to obtain an act or license for taking the name and arms of *Evans*; in case of neglect, the subsequent devises to be accelerated. And he appointed *D. H. T. G. Williams*

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and *William Jones Evans* residuary legatees and executors of his will and the codicils thereto.

The testator died on or about the 7th of *March* 1843, without having altered or revoked his will, save so far as the same may have been revoked or altered by the said codicils, or some or one of them, and without having in anywise altered or revoked the said codicils, or any of them, save so far as any or either of the said codicils of prior date may have been altered or revoked by some or one of the said codicils of subsequent date.

The plaintiffs are the same persons as are respectively named *David Herbert Thackeray Griffies Williams* and *Wathin Lewis Griffies Williams* in the will and codicils. The defendant is the person named *Herbert Davies* in the fourth codicil. *Herbert Davies* has, by Her Majesty's Royal license, assumed the surname of *Evans*, in addition to his other names, and also the arms &c.

The titles or rent charges sought to be recovered in this action, under the devise or gift in the said testator's will of "all and every my shares, parts and proportions of and in the tithes yearly arising, growing and renewing within the said parish of *Llanwenog*, and titheable places thereof (save and except" &c.), are all the tithes, or parts or shares of tithes, or rent charges in lieu of tithes, of or to which the said testator was seised or entitled, except such as issued out of the demesne lands of the said testator called *Higlmead*.

The defendant has entered into the possession or receipt of the said tithes, or rent charges in lieu of tithes, which are sought to be recovered in this action, and claims to be entitled to and to hold the same for his own use and benefit under the fourth codicil, together with all the rents and profits of the said testator's mansion

house and demesne lands at *Highmead* aforesaid, and other his corporeal real estates in the counties of *Cardmarthen*, *Cardigan* and *Pembroke*.

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The plaintiffs contend that the gift or devise, in the will contained, of the tithes or rent charges in lieu of tithes, sought to be recovered in this action, is not revoked, postponed or altered by the fourth codicil, or otherwise; and that they, or one of them, are entitled to the possession or receipt of the tithes or rent charges.

Either party to be at liberty to turn this case into a special verdict, and take the opinion of the Court of Error thereon.

The question for the consideration of the Court was stated to be: Whether the plaintiffs, or either of them, are or is entitled at law to an estate for their or his heirs, or life, or for any other estate in possession, in the tithes or rent charges, sought to be recovered in this action, or to the perception or receipt thereof.

The case was argued in last term (a).

Crowder, for the plaintiffs. The words "real estates," in the fourth codicil, would certainly pass the tithes to the defendant, if taken by themselves: but the question is whether, on looking at the will and the other codicils, it does not sufficiently appear that these words are intended to comprehend only the corporeal hereditaments. Now in the will there is a clear distinction between tithes and lands; and "real estate" is confined to the latter. After an express devise of the tithes, there is a proviso that, in a certain event, the tithes shall go to *W. L. G. Williams* for life, "and, after the expiration thereof, to the

(a) January 25, 1853. Before Lord Campbell C. J., Coleridge, Wightman and Crompton Js.

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several provisions and uses herein expressed and contained of and concerning my real estate." Afterwards there is a direction that inventories of the property bequeathed as heir looms shall be deposited "with the writings and the deeds concerning my real estates." [Coleridge J. I observe that the word used is sometimes "estate" and sometimes "estates:" do you find that these expressions have different meanings in the will?] They appear to be used indiscriminately. Then follows, in the will, a devise of "all my real estate, of what nature or kind soever, and wheresoever situate." The argument on the other side, if correct, would shew that this is, even in the will, a revocation of the devise of the tithes: but that is manifestly inconsistent with the use of the words in the will. [Lord Campbell C. J. *W. L. G. Williams* would take an interest in remainder in the tithes, under the limitation of the real estate, if it comprehended tithes.] Again, the bequest of 500*l.* to the widow is on condition that she execute an instrument, binding herself to receive an annuity "from the person who for the time being shall be in possession of my real estate, under the limitations aforesaid," in lieu of herself taking possession of the hereditaments settled on her by way of jointure. That must refer exclusively to land. In *Evans v. Evans* (a) this devise was before *Shadwell* V. C., who decided that the devise of "real estates" in the codicil comprehended tithes, and therefore revoked the devise of tithes in the will; but he admitted that the same words in the will did not comprehend tithes: the question is whether the two views are consistent, and, if not, which is to prevail. The second codicil changes the order of persons "in the

entail in my estates real and personal:" now this entail of the realty is confined to the lands, unless the "real estate" in the will comprehended the tithes. In the third codicil it is declared that all the "estates" disposed of in the will are to be without impeachment of waste, and timber may be cut for "all buildings on the estate;" language inapplicable to incorporeal hereditaments. Then can a larger meaning be assigned to the words in the fourth codicil? In *Doe dem. Hearle v. Hicks* (a) the House of Lords held that a clear life estate given by will to the testator's wife in a copyhold was not revoked by a codicil "revoking and making null and void several of the dispositions heretofore made by me in my said will and codicils of all my freehold, copyhold and personal estate and effects of all and every kind and description." In *Sugden's Treatise of the Law of Property, as administered by the House of Lords*, p. 215. note (1), an analysis of this case is given, which is fuller than the report of the case in the House of Lords.

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Sir *Fitzroy Kelly*, *contrà*. If the will stood alone, the plaintiffs would be entitled to the tithes: it is not suggested, on the part of the defendant, that the devise of the tithes is revoked in the will itself. The question arises on the general devise in the codicil. It is important to keep in view the distinction between questions as to revocations of limitations in a devise by other limitations in the devise itself, and questions as to revocations by a codicil: the presumption against the revocation is much less strong in the latter case than in the former.

(a) 1 Cl. & Fin. 20; S. C. 8 Bing. 475; affirming the judgment of Exch. Ch., which reversed the judgment in Exch.; *Hicks v. Doe dem. Hearle*, 1 Y. & J. 470. For another point in the same will, see *Graves v. Hicks*, 5 A. & E. 38.

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The subject is discussed in 1 *Jarman on Wills*, 158.

The deviser here meant to make his niece *Mary Ann Elizabeth Evans*, the mother of the defendant, the first object of his bounty: by the will the real estate is given to her for life, remainder to her first and other sons in tail, the tithes having been first excepted. The real estates are afterwards by the codicil given, without exception, to her son the defendant. This is the natural as well as the legal effect of the language in the fourth codicil. The rearrangement of the order of the interests in the entail is a revocation: one limitation is in fact annulled and another substituted for it. [Lord *Campbell*, C. J. Do not the codicils refer us back to the will, so as to shew what "real estate" means throughout?] Suppose the testator had said in express words that he revoked the devise of real estates contained in the will: would not that revocation have affected the tithes? It is to be observed that the defendant, even by the will, had already a contingent interest in the tithes. And the fourth codicil makes a new provision for the plaintiff *D. H. T. G. Williams*, by constituting him residuary legatee. In *Doe dem Hearle v. Hicks* (a) the question lay between holding the whole will revoked, or the devise of the copyhold unrevoked: and, inasmuch as the language of the codicil shewed an intention to leave some of the will unrevoked, the latter construction was preferred. That reasoning is inapplicable to the present case.

Crowder, in reply. The language of the will may be construed as if the deviser had expressly said that by "real estate" he did not mean to include tithes. The

(a) 1 *Cl. & Fin.* 20.

distinction in support of which *Jarman on Wills* has been cited is undoubtedly sound; but it is inapplicable to a case where a codicil expressly refers to a will: there the effect is to make the whole one instrument, so far at least as regards language. The codicil contains no express words of revocation.

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LORD CAMPBELL C. J. now delivered the judgment of the Court.

We have taken time deliberately to consider this case, out of respect for the opinion of the late Vice Chancellor *Shadwell*, as reported in 17 *Simons*, 98, "that it is perfectly plain," "that the gift of the tithes, made by the will, to *David* and *Watkin Williams*, in succession, is revoked by the devise in the last codicil." After carefully looking at the will and codicils, and referring to the authorities relied upon in the argument, we feel ourselves obliged to adhere to the contrary opinion, that the gift of the tithes in question to the plaintiffs remains unrevoked, and that they are entitled to our judgment.

Their right to life estates in succession under the will being clear and undisputed, it lies on the defendant to shew clearly that the devise in their favour in the will has been revoked. There is no express revocation; and reliance can only be placed upon a subsequent inconsistent disposition, by codicil, of the previously devised property.

The leading case upon this subject is *Doe dem. Hearle v. Hicks* (a), *Sugden's Treatise of the Law of Property*,

(a) 1 Cl. & Fin. 20.

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as administered in the House of Lords, 214; in which it was decided that a life estate clearly given by a will to a testator's wife, in a portion of his real estate which was copyhold, was not revoked by a codicil by which he revoked several of the dispositions in his will of all his freehold, copyhold and personal estate and effects of all and every kind and description, and, in the place of such devise, disposition and bequest, he devised and bequeathed all and every his freehold, copyhold and personal estate and effects, of every kind and description, whatever and wheresoever situated, unto his daughter, and afterwards to his grandson. *Tindal C. J.*, in that case, delivering the opinion of the Judges on which the House of Lords acted, said: "The general principle upon which this opinion proceeds may be stated thus:—The testator does by his will shew a clear and manifest intention to devise the *Plomer Hill Estate* to his wife for life, or during her widowhood. If such devise in the will is clear, it is incumbent on those who contend it is not to take effect by reason of a revocation in the codicil to shew that the intention to revoke is equally clear and free from doubt as the original intention to devise; for if there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought undoubtedly to stand." "Whether, therefore, this devise was revoked must be determined, not by any express words to that effect, but by the consideration, whether, upon the construction of the codicil, the devise and disposition therein contained must of necessity be held inconsistent with the devise to the wife." The Vice Chancellor declared that he concurred in this general

doctrine, although the case of *Doe dem. Hearle v. Hicks* (a), he thought, bears upon the face of it essential marks of difference from the present case.

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In the present case, the supposed inconsistency is in the fourth codicil, by which the testator devises all his real estates of what nature or kind soever unto *Herbert Davies*, the now defendant, in strict settlement, and, on failure of such issue, he devises all his said real estates in such manner as is in that behalf mentioned in his said will, declaring it to be his will that the devises hereinbefore made shall take effect in precedence to the devises of his real estates contained in his said will.

Are the tithes devised by the will for life to the plaintiffs clearly meant by the testator to be included in the real estates which he devises by the fourth codicil in strict settlement to the defendant? If this was his intention, the fourth codicil amounts to a revocation, as contended for by the defendant. But, although "real estates" may unquestionably include tithes, and *prima facie* would do so, we are to see in what sense the testator uses the words in the will and in the codicil. Now it is admitted here that the words in the will did not include the tithes: for in the will the testator calls tithes "tithes," and every kind of real property except tithes "real estate." Why should it be supposed that he uses "real estates" in a different sense in the codicil? This is not in the slightest degree necessary for effecting his purpose to substitute the afterborn son of his niece for his niece respecting the inheritance of his real estates. She was to have taken the real estates *minus* the life interest in

(a) 1 *CL & Fin.* 20.

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the tithes given to the plaintiffs in succession: and the manifest intention of the fourth codicil is, that her son should do the same. The birth of the son was a sufficient reason for altering this disposition; but nothing had occurred as a reason for altering the disposition respecting the tithes. The testator expressly declares his object to be that the devises made by the fourth codicil shall take effect in precedence to the devise of his real estates contained in his will. The alteration was only to apply to what he called his "real estates," exclusive of the interest in the tithes given by the will to the plaintiffs: and in all other respects his will was to have its full operation.

Under these circumstances, we think that the defendant has entirely failed in shewing a revocation, and that the plaintiffs take the same interest as if the fourth codicil had never been executed. We come to this conclusion on the same principle which guided us in the late case of *Doe dem. Evers v. Ward* (a), that a revocation by subsequent codicil, whether by express words of revocation or by devise inconsistent with the former devise, shall operate so far only as is necessary to effectuate the intention of the testator.

Judgment for the plaintiffs.

(a) *January 30th, 1852.*

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EDMUND MOREWOOD and GEORGE ROGERS *against* Friday,
 JOHN POLLOK, ARTHUR POLLOK, ALLAN GIL- April 22d.
 MOUR, and ROBERT RANKIN.

DECLARATION: that defendants were the owners of a certain vessel called *The Barbara*, lying at anchor at the port of *Mobile*, in the *United States of America*, and bound on a certain voyage at and from the port of *Mobile* aforesaid to *Liverpool*: and thereupon one *W. A. D.*, at *Mobile*, delivered to defendants, on account of plaintiffs, and defendants then accepted and received, a quantity of cotton, to be by defendants safely carried and conveyed to and shipped on board of *The Barbara*, and carried and conveyed in the said vessel to *Liverpool*, and there to be delivered to plaintiffs, the dangers of the seas only excepted, for freight and reward payable by plaintiffs to defendants in that behalf. And, although defendants, so being owners of the said vessel called *The Barbara*, received the said cotton, to be safely conveyed to and shipped by them on board the said vessel to be carried and delivered as aforesaid, and have delivered a small part of the said cotton at *Liverpool* aforesaid, yet defendants did not safely carry and convey to the said vessel and ship on board thereof the residue of the said cotton, nor safely convey the said residue therein, nor deliver the same to plaintiffs at *Liverpool* aforesaid, although not prevented from so doing by the dangers of the seas: but, on the contrary, by and

Goods were delivered at *M.* to the owners of the ship *B.*, to be conveyed on board the ship *B.* and then to be carried in her to *L.* The goods were destroyed by a casual fire on board a lighter employed by the owners of the *B.* to convey them from *M.* to the ship *B.* Held: that stat. 26 G. 3. c. 86. s. 2. did not protect the owners of the *B.*, as the fire was not on board their ship.

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through the mere carelessness, negligence, misconduct and default of defendants and their servants, the said residue of the said cotton, while the same was on board of a certain lighter for the purpose of being conveyed to and shipped on board of *The Barbara*, and before the same was shipped on board of the said vessel, was destroyed by fire.

Plea 2. That, before and at the time of the delivery to, and acceptance and receipt by, defendants of the said cotton, plaintiffs and defendants were all subjects of our Lady the Queen resident and domiciled in that part of the United Kingdom of *Great Britain* and *Ireland* which is called *Great Britain*; and that the said lighter was a vessel, necessarily and properly and according to the custom of the said port of *Mobile*, used for the carrying of the said cotton over the water from the land to the said ship. That the said carelessness, negligence, misconduct and default in the declaration mentioned, if any such there was, was committed by the said servants in the absence of defendants and of every of them, and without the licence, consent or privity of defendants or any of them; and that the carelessness, negligence, misconduct and default, with which defendants are charged, is solely the said supposed carelessness, negligence, misconduct and default of their said servants, and of which they, defendants, were guilty, if at all, merely as being the masters of and responsible for such servants and not otherwise. That the said residue was consumed by the said fire in the declaration mentioned, and so lost, and was not lost by, from or through any other cause whatsoever; and defendants say that they were prevented, not by any other cause or matter, but solely by the said loss so occasioned as aforesaid, from carrying and con-

veying and delivering the said residue according to the said terms on which the said cotton was delivered to and received by them as in the declaration mentioned. And so defendants say that, by reason of the premises and by force of the statute in such case made and provided, they are not liable to the claim of the plaintiffs.

Demurrer. Joinder.

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W. L. Jones, for the plaintiffs. The question depends on the construction of stat. 26 G. 3. c. 86. s. 2., which enacts: "that no owner or owners of any ship or vessel shall be subject or liable to answer for or make good, to any one or more person or persons, any loss or damage which may happen to any goods or merchandise whatsoever, which, from and after the 1st day of *September*, 1786, shall be shipped, taken in, or put on board any such ship or vessel, by reason or means of any fire happening to or on board the said ship or vessel." In *Gale v. Laurie* (a) *Abbott C. J.*, in delivering the judgment of the Court, says of the Acts for the relief of owners of ships, of which this is one: "these Acts were certainly made to encourage persons to become owners of ships, and in conformity with similar provisions contained in the law of many of the maritime states of the continent of Europe. Their effect, however, is to take away or abridge the right of recovering damages, enjoyed by the subjects of this country at the common law; and there is nothing to require a construction more favourable to the shipowner, than the plain meaning of the words imports." And in *Hunter v. McGown* (b) it was decided by the

(a) 5 B. & C. 156. 163.

(b) 1 Bligh, 573.

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Bramwell, contra. The defendants being shipowners, and their ship being at a port where she cannot come alongside the quay, they receive the goods in a lighter to carry them to the ship. It is not disputed that, if the fire had taken place on board the ship, the defendants would be protected by stat. 20 G. 3. c. 86. s. 2. The question comes to be, whether, for all practical purposes, the goods are not shipped as soon as they are taken by the shipowners to be carried on the sea. The policy of the statute was to protect shipowners; and they should be protected equally in their own ship and on the lighter ancillary to it. Or, if the lighter is viewed as a distinct vessel, then the carriers are protected because the fire was on board of it. In *Hunter v. McGown* (a) the lighter was employed as rivercraft: she was going up the *Clyde* from *Greenock* to *Glasgow*. The decision would have been different if a similar vessel had been bound outwards. And the fire here took place on board the lighter; and therefore the defendants are protected, as they were owners of her for the time. The statute cannot be construed so literally as not to protect a charterer or other person, not literally owner of the vessel, though receiving goods on board to be carried on a sea voyage in her. [*Crompton J.* The goods are delivered to the defendants on shore at *Mobile*, to get them on board *The Barbara* as they can, and then to carry them per *The Barbara* to *Liverpool*. You seem to

(a) 1 *Bligh*, 573.

treat the case as if the goods were delivered to them for two sea voyages, one from <i>Mobile</i> to <i>The Barbara</i> per lighter, the other from the lighter per <i>The Barbara</i> to <i>Liverpool</i> .]	1853.
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W. L. Jones was not called on to reply.

Lord CAMPBELL C. J. I think the plea is bad. The defendants were liable at common law: and, unless they can bring themselves within the terms of some Act relieving them, they remain liable. They plead a plea which it is said is justified by stat. 26 G. 3. c. 86. s. 2. That enactment protects the owners of any ship from making good any loss which may happen to goods "shipped, taken in, or put on board any such ship or vessel, by reason or means of any fire happening to or on board the said ship or vessel." Now we are to say whether the protection given by this Act extends to the facts put upon the record. We are to see what the Legislature has said. We are not to consider what it may or may not have been politic to protect, but what it is that the Legislature actually has protected. Now this declaration states that the goods were delivered on account of the plaintiffs at *Mobile*, and were there accepted by defendants to be by the defendants safely carried and conveyed to and shipped on board *The Barbara*, and carried and conveyed in her to *Liverpool*. The goods were lost: and, it must now be taken, lost by a fire occasioned by the negligence of persons on board a lighter, not belonging to the defendants, which was carrying the goods to the ship. These facts do not constitute a case which is embraced by the

1853. Act. This lighter cannot be considered as part of the ship *Barbara*: it is a public lighter employed by the owners of that ship for the purpose of conveying the goods to her. Again, it seems that, to bring a case within the Act, the fire must be on board a ship which is the property of the defendants. In this case the fire was on board the lighter of which the defendants were not owners. It seems to me clear, therefore, that the facts do not bring the defendants within the enactment; and, consequently, that their common law liability remains.

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WIGHTMAN J. I am of the same opinion. Reliance is placed by the defendants on stat. 26 G. 3. c. 86. s. 2.: but I think it does not apply under the circumstances stated in this plea. The enactment is, that no owner of a ship shall be answerable for any loss by reason of a fire happening "on board the said ship." Now I think that there is no doubt that this fire did not happen on board *The Barbara*. It is said that the lighter may be taken to be part of her; but I see no ground for saying so. Then Mr. *Bramwell* says that the defendants may be considered as owners of the lighter. But they were not owners of the lighter: they only employed her as any one else might have done.

CROMPTON J. (a) concurred.

Judgment for plaintiffs.

(a) *Esle* J. was absent.

1853.

WALLER, Appellant, *against* DRAKEFORD,
Respondent.

Friday,
April 22d.

APPEAL from the County Court of *Cheshire* holden at *Congleton*, in a plaint *Drakeford v. Waller*, on the following case.

This is an action to recover from the defendant 21*l.* 9*s.* 6*d.*, the alleged value of certain household goods and furniture sold to defendant by *John McDougal Bambrough*, subsequently convicted of bigamy, but who at the time of sale was *de facto* married to plaintiff. On the hearing of the case, before *Joseph St. John Yates*, Esquire, on the 25th *January* 1853, the facts proved and admitted were as follows. That the plaintiff, being widow of *Drakeford*, having previously to her marriage with him been wife to one *Foster*, also deceased, married on 7th *April*, 1851, one *Bambrough*, whom she supposed to be a single man. They lived together as man and wife for eleven months; the goods, the subject of the present action, being a portion of the furniture in the house in which they lived, and having belonged to one or other of her former husbands. That, on the 17th *March*, 1852, the rent of the house being in arrear to the extent of something near 5*l.*, the

A., a widow, married *B.*, whom she believed to be a single man. *A.* was not the personal representative of her deceased husband; but she was possessed of furniture which had been his property, and which, after her marriage with *B.*, continued in the house in which *B.* and *A.* lived. *B.* sold and delivered those goods to *C.*, with *A.*'s concurrence, and *C.* paid *B.* for them. After this it was discovered that *B.* was a married man, and that his marriage with *A.* was void. This was unknown either to *A.* or *C.* till after the

sale. *A.* sued *C.* in the county Court for the value of the goods.

Held, on appeal, that, the property being in the personal representative of her deceased husband, *A.* could not maintain an action against any one but as wrongdoer; and that, as *C.* had taken the goods with *A.*'s concurrence, he was not a wrongdoer as against her.

And that, even on the supposition that the goods belonged to her, *A.* had constituted *B.* her agent to sell, and could not dispute the sale made by him as her agent to an innocent party.

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goods in question were taken in distress as for rent due from *Bambrough*, the tenancy of the house having in fact, some time previously, been changed from plaintiff's name to that of *Bambrough*: and, when the bailiffs had been from three to four days in possession, the defendant was sent for by *Bambrough*, and so much of the goods sold to him, defendant, as sufficed to pay off the distress; and these goods were forthwith removed. In the course of the same day, the defendant purchased the remainder of the property under the circumstances hereinafter referred to. The defendant paid *Bambrough* and the bailiffs, by *Bambrough*'s direction, the several sums agreed on for the two lots of goods, and took a receipt from *Bambrough* for the entire sum as for one payment. That, about a month after these occurrences, *Bambrough* was taken up and committed upon a charge of bigamy: and at the last *Chester* Summer Assizes he was convicted of having married the present plaintiff, he having at that time another wife living; and he is now undergoing punishment upon this conviction. It was also admitted that, up to the day of the arrest, neither the plaintiff nor the defendant had even a suspicion but that her marriage with *Bambrough* was valid; and that none of the goods, the subject of the present action, were the property of *Bambrough*; and that they had been purchased prior to the decease of *Drakeford*, plaintiff's second husband, and in her possession from his decease to the time of her marriage with *Bambrough*, and in the same house, and so continued until the distress; that plaintiff was not executrix of, nor had taken administration to, either her first or second husband; and that the plaintiff did not oppose the transactions with *Bambrough* and defendant,

but that she actively interfered to carry them out; to the same extent however, and in the same manner only, as is usual with women in her station of life in reference to similar family arrangements. But it was not proved that any of the proceeds of the sale came either directly or indirectly to her hands, or were applied for her benefit, except in so far as the bailiffs were by these means removed out of the house. It was also proved that, previous to the commencement of this action, the amount of rent and expenses was tendered by plaintiff to defendant. The value of the goods sued for was proved to be 12*l.* 12*s.* 0*d.*; and his Honor gave judgment against the defendant for that amount. Against which decision the defendant appeals.

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The questions for the opinion of the Court of Queen's Bench, under the circumstances admitted and proved, are :

1. Whether or not, upon the facts stated, the decision of the Judge was right or wrong in point of law.

2. And, in case the Court of Appeal consider it right in law, whether or not there ought not to have been a deduction from the amount of the judgment to the extent of the sum paid to the bailiffs for rent and expenses.

Welsby, for the appellant (the defendant in the plaint). The goods are not the plaintiff's property; for they belong to the representatives of one of her deceased husbands, it is immaterial which. She seems at one time to have been in possession; and, whilst she was so, she probably was able to maintain a possessory action against

1853. every person except the legal representative of her deceased husband: but, before the defendant did anything, she parted with that actual possession, and conferred it on *Bambrough*. After having done so, she could maintain no action even as against a wrong doer. Besides, supposing that the property was her own, she constituted *Bambrough* her agent to sell it: and, though she was induced to do so by a mistaken belief that he was her husband, she is bound to the defendant who was no party to the deception.

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Miller Serjt., contra. The plaintiff had no intention to part with the property in these goods, though she obeyed the man whom she erroneously believed to be her husband and therefore owner of the goods. Suppose a servant had by her master's orders delivered a parcel to a purchaser from him, believing it to contain his property, but the master had, without the knowledge of the servant, sold the servant's property: the servant would not be concluded from asserting her property. That would be like the present case.

Welsby was not called upon to reply.

Lord CAMPBELL C. J. It seems to me clear that the Judge ought to have given judgment for the defendant. In the first place, the plaintiff shews no property in her sufficient to maintain the action. It is clear that she never had any absolute property; for the goods belonged to the personal representative of one or other of her deceased husbands. But, though she had no right of property as against the personal representative, yet as

against a wrong doer mere possession might be sufficient to enable her to maintain an action. But the defendant cannot be considered as a wrong doer as to her, the goods having been taken with her concurrence and assent; and therefore mere possession would not be sufficient to enable her to maintain the action against him. But, further, even if the property had been absolutely her's, it would be so on the ground that she was in fact a feme sole, as otherwise it would have belonged to *Bambrough*. And, being a feme sole and capable of contracting, she represented to the defendant that *Bambrough* had authority to sell these goods. It is found that she not merely "did not oppose the transactions with *Bambrough* and defendant, but that she actively interfered to carry them out." By so doing she constituted *Bambrough* her agent to sell the goods: he did sell them: and she cannot now say that it was no sale.

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WIGHTMAN and CROMPTON J^s. concurred (a).

Decision reversed with costs.

(a) *Erie J.* was absent.

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Friday,
April 22d.

EDWARD EVANS, FREDERICK LONGDON and
THOMAS WALMSLEY *against* The LANCASHIRE
and YORKSHIRE Railway Company.

An Act, passed
in 1844, for
making a rail-
way from A.,
contained a

DEBT. The declaration stated that, by stat. 7 & 8
Vict. c. lxxxii (a), The Ashton, Stalybridge, and
clause that nothing in that Act should prevent its being subject to any general Act, relating to railways, subsequently passed. It also contained a clause authorizing *The L. & M. Railway Company* to purchase the line. *The L. & M. Railway Company* did purchase the line. In 1847 an Act was passed, reciting the Acts under which *The L. & M. Railway* and its branches were made, including the Act of 1844, and, that it was expedient that the powers conferred by them should be altered. It changed the name of the Company from *The L. & M. Railway Company* to *The L. & F. Railway Company*, and incorporated the general Acts of 1845 with that Act, so far as not inconsistent therewith.

The L. & F. Railway Company injuriously affected lands of O., after 1847, by works done under the powers of the Act of 1844. O. gave notice that he chose to have his claim settled by arbitration under The Lands Clauses Consolidation Act, 1845; and, the Company not having done anything, he formally appointed F. arbitrator for both. F. made his award, but more than three months after his appointment.

Held, that The Lands Clauses Consolidation Act, 1845, applied, and that O. was entitled to have the claim settled by arbitration in manner provided in sect. 68. But held, also, that sect. 23 applied as well to arbitrations under sect. 68 for claims for damages to lands taken, as to arbitration for claims for lands intended to be taken; and consequently that the award was out of time.

(a) Local and personal, public: "For making a railway from *The Manchester and Leeds Railway* to the towns of *Ashton* under *Lyne* and *Stalybridge*." Royal Assent, 19th July 1844.

This Act incorporates *The Ashton, Stalybridge, and Liverpool Junction Railway Company*, by that title. It contains clauses analogous to those afterwards enacted in The Lands Clauses Consolidation Act, 1845, but not quite identical. Sect. 343 authorizes *The Manchester and Leeds Railway Company* to purchase *The Ashton, Stalybridge, and Liverpool Junction Railway*. Sect. 387 enacts: "That nothing herein contained shall be deemed or construed to exempt the railway by this or" certain therein "recited Acts authorized to be made from the provisions of any general Act relating to this Act which may pass during the present session of Parliament, or of any general Act relating to railways which may pass during the present or any future session of Parliament."

The Court having decided this case upon the more general ground, it is not thought necessary to state fully the provisions of the special Acts.

Liverpool Junction Railway Company were incorporated, with power to make a certain railway. That, under the provisions of that Act, *The Manchester and Leeds Railway Company* afterwards purchased the railway, whereupon, by force of the same statute, the first mentioned Company was dissolved, and its undertaking vested in *The Manchester and Leeds Railway Company*. That by "*The Manchester and Leeds Railway Act No. 3., 1847*" (a), the name of *The Manchester and Leeds Railway Company* was changed to that of *The Lancashire and Yorkshire Railway Company*. That the railway was commenced by the first mentioned Company, before their undertaking became vested in the other Company, and has since been completed by the defendants. That the plaintiffs were assignees of certain lands, that is of a term of twenty five years computed from the 24th June 1826, and entitled to compensation in respect of their interest in the lands on account of the injuriously affecting the said lands by the execution of the works authorized by the Acts. That, during the period which elapsed between the last day of the session of Parliament held in the 10th and 11th years of the reign of Her

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(a) 10 & 11 Vict. c. clxiii., local and personal, public: "To enable *The Manchester and Leeds Railway Company* to make certain branches, extensions, and other works, and to alter the name of the Company." Royal Assent, 9th July 1847.

Sect. 1 recites the various special Acts under which the different parts of the recited railway were framed, and, amongst others, stat. 7 & 8 Vict. c. lxxii., and that it is expedient "that some of the powers and provisions contained in the recited Acts should be altered, amended and enlarged." The same section provides for the change in the name of the Company. Sect. 4 enacts: "That the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, shall be incorporated with this Act, save as to such parts thereof as may be modified by or are inconsistent with the provisions of this Act."

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present Majesty and the giving notice of claim after mentioned, the same lands were injuriously affected by the execution of the said works of the defendants; that the plaintiffs at the time of giving the said notice of claim were, and still continued, entitled to compensation in respect of the said lands and their said interest having been injuriously affected by the works of the defendants. That the plaintiffs claimed compensation to an amount exceeding 50*L*.; that the promoters of the undertaking had not made satisfaction in respect of such injuriously affecting: that the plaintiffs, on the 23d *August* 1850, gave to and served on the defendants, the promoters, a notice, in writing under their hands, of the said lands and of the plaintiffs' interest therein having been injuriously affected as aforesaid, and of plaintiffs claiming more than 50*L*. for compensation, stating the nature of the plaintiffs' interest, and also the amount of compensation claimed, and that the plaintiffs desired the claim and amount of compensation, in case the same were disputed, to be settled by arbitration, and requested the defendants to appoint an arbitrator. That the plaintiffs under their hands duly appointed *Thomas Makin Fisher* arbitrator on their behalf, and delivered the appointment to him; that the defendants disputed the plaintiffs' claim, and did not within twenty one days after receipt of the said notice enter into any agreement to pay the compensation, nor concur with the plaintiffs in the appointment of a single arbitrator: that the defendants for the space of twenty one days after service of the said notice, and the further space of fourteen days after expiration of the said twenty one days, to wit ten months after the receipt of the said notice, failed to appoint an arbitrator: that the plaintiffs, after such failure, to wit

on the 5th *August* 1851, under their hands duly appointed the said *T. M. F.* arbitrator on behalf of both parties, and gave the defendants notice in writing thereof, under the hands of the plaintiffs. That *T. M. F.*, before he entered into the consideration of the matters referred to him, to wit 16th *October* 1851, in the presence of a justice of the peace, made and subscribed a declaration; and afterwards, to wit 27th *April* 1852, made his award in writing; and thereby found and awarded that, after the last day of the session of Parliament holden in the 10th and 11th years of the reign of Her present Majesty, and before the 22d day of *August* 1850, and during the period which elapsed between the two last mentioned days, the said lands of the plaintiffs were injuriously affected by the execution of the works of the defendants; and that the plaintiffs were entitled to compensation in respect of the said lands to the amount of 3000*l.*; and that the said sum of 3000*l.* should be paid by the defendants to the plaintiffs on the 10th *May* 1852. Yet that, although the defendants had notice of the award and were requested to pay, and the 10th day of *May* had elapsed, the defendants had not paid.

Pleas (amongst others which it is not necessary to notice): 3. That the works, by the execution whereof the lands of the plaintiffs were injuriously affected, were works executed under and in the execution of the powers and provisions contained in the first mentioned Act, and were not works or an undertaking, or works in or about or in respect of an undertaking, authorized by an Act passed after the passing of the Lands Clauses Consolidation Act 1845: wherefore the plaintiffs were not authorized to have the said claim for compensation

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settled under the last mentioned Act; and the said award was and is void: verification. Replication: De injuriâ. Issue thereon. 9. That the award was not made within three calendar months from the time of his first being or becoming arbitrator: verification. Demurrer. Joinder.

The issues in fact came on to be tried before *Wightman J.* at the *Liverpool* Summer Assizes 1852; when a verdict was found for the plaintiffs, subject to a case, of which the following is the substance.

The plaintiffs were the trustees, under a deed of assignment from *Mary Anne Orrell* to them, for the benefit of her creditors, dated the 28th *October*, 1846. Under that deed they were assignees of so much of certain bleach and dye works and grounds at *Culcheth* near *Manchester* as had not been previously conveyed to *The Manchester and Leeds Railway Company*, as herein-after mentioned, for the residue of a term of twenty five years demised by a lease made 10th *May* 1826. On 19th *July* 1844, stat. 7 & 8 *Vict. c. lxxxii.* passed. On 16th *October* 1844, *The Ashton, Stalybridge, and Liverpool Junction Railway Company* gave a notice to treat, under that Act, for the purchase of a portion of the lands forming part of the bleach and dye works and grounds. On 15th *January* 1845, the last mentioned Company conveyed the undertaking to *The Manchester and Leeds Railway Company*; and the purchase by this latter Company was completed. On 25th *March* 1845, in pursuance of the said Act, *Mrs. Orrell*, who then held the lease, and the other parties then interested, agreed with *The Manchester and Leeds Railway Company* to refer the amount of compensation for the lands so required to arbitration; and on the same day the same Company were let into possession of the

portion specified in the notice. On 6th *June* 1845, the arbitrator made his award in respect of the land so required from Mrs. *Orrell*, including compensation to the said *Mary Anne Orrell* as such lessee, and awarded the sum of 225*l.* to her as compensation. On the 21st day of *July*, 1845, *The Ashton, Stalybridge, and Liverpool Junction Railway Act*, 1845 (8 & 9 *Vict. c. cix. (a)*), passed. On 11th *August* 1845, Mrs. *Orrell* conveyed the portion required to *The Manchester and Leeds Railway Company*, by reference to a plan corresponding with that annexed to the notice to treat for the residue and remainder of her said term, in consideration of the sum awarded, and which was paid to her. On 9th *July* 1847, *The Manchester and Leeds Railway Act No. 3*. 1847, 10 & 11 *Vict. c. clxiii.*, passed. The defendants, before and after the passing of the last mentioned Act, continued to execute and carry on the undertaking authorized by stat. 7 & 8 *Vict. c. lxxxii.* and the subsequent Acts. A single line of rails was at first laid over the portion of the land conveyed to them from Mrs. *Orrell*; and this single line was opened for public traffic in the spring of 1846. The defendants afterwards added another line of rails over the same portion of land; and in and about the making such second line, and during the period between the last day of the session of Parliament held in the 10th & 11th years of the reign of Her Majesty, viz. 23d *July* 1847, and 22d *August* 1850, injuriously affected to some extent, as alleged, the bleach and dye works and grounds which were during that time in the occupation of the plaintiffs. The por-

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(a) Local and personal, public: "For amending the Act relating to *The Ashton, Stalybridge, and Liverpool Junction Railway*, and for making a branch therefrom to *Ardwick*."

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tion of railway, in and about the making or completion of which the plaintiffs sustained the injury complained of, was part of the line originally authorized by stat. 7 & 8 *Vict. c. lxxxii.*, which passed on 19th *July* 1844, and formed no part of the branches, extensions, deviations or new works authorized by the said *Ashton, Stalybridge, and Liverpool Junction Railway Act, 1845, 8 & 9 Vict. c. cix.*, or the said *Manchester and Leeds Railway Act No. 3. 1847, 10 & 11 Vict. c. clxiii.*

On 22d *August* 1850, the plaintiffs gave to and served on the defendants a notice, in writing under their hands, of the said lands, and of their interest therein, having been injuriously affected by the execution of the works; stating therein the nature of their interest, and the amount of compensation, 3,000*l.*, claimed, and their desire to have their claim settled by arbitration. On the same day they delivered a notice or appointment signed by them to *T. M. F.*, a valuer. Notice of this appointment was on the same day served on defendants. The defendants having taken no notice of this, the plaintiffs, on the 5th *August* 1851, delivered to *T. M. F.* a notice signed by them, appointing him arbitrator for both parties. The plaintiffs on the same day gave the defendants notice of this appointment. The defendants, on the 27th *August* 1851, served notices on the plaintiffs and the said *T. M. F.*, denying the plaintiffs' right to an arbitration, on the matters referred to in the notices of the plaintiffs, and protesting against the attempt to refer such claim and settle the same by arbitration: and the defendants never appeared before the said *T. M. F.* on the said reference, nor acquiesced in the proceeding.

On 16th *October* 1851, before *F.* entered into the

consideration of any matters referred to him, he, in the presence of a justice, made and subscribed a declaration. On 27th *April* 1852, *F.* made, published and subscribed his award.

At the trial it was contended, on the part of the defendants, that the plaintiffs must fail, on such of the issues as were applicable, on the grounds that the case did not come within sect. 68 of the Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c. 18.*); and consequently that there was no valid submission to arbitration; and that the award was void under sect. 23 of the last mentioned Act, having been made more than three months after the reference to arbitration.

The questions for the opinion of the Court were stated to be: Whether the above objections, or either of them, were fatal. If either was fatal, a nonsuit to be entered: otherwise, the verdict to stand; the demurrer remaining to be argued.

The special case and the demurrer were set down in the special paper for argument. The special case stood first.

Cowling, for the plaintiffs. The first question is, whether sect. 68 of The Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c. 18.*), applies. The material fact is, that the lands of the plaintiffs were injured after the end of the session of Parliament in 1847. Now stat. 7 & 8 *Vict. c. lxxxii.*, which incorporated the original railway company, *The Ashton, Stalybridge, and Liverpool Junction Company*, was passed in 1844, at a time when the general Acts, which received the Royal Assent in the following year, were in contemplation. The Railways Clauses Consolidation Act, 1845, 8 & 9

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Vict. c. 20., received the Royal Assent on 8th May 1845.

By sect. 1 it is made applicable "to every railway which shall by any Act which shall hereafter be passed be authorized to be constructed:" and, by sect. 6, The Lands Clauses Consolidation Act, 1845 (which on the same day received the Royal Assent), is also made applicable to such railways. Probably, had nothing more taken place, these Acts would not have applied to the line authorized by stat. 7 & 8 *Vict. c. lxxxii.*, as it was not an Act thereafter passed. [Lord Campbell

C. J. Is that clear? Might not sect. 387 of the special Act have the effect of incorporating the subsequent general Acts?] Perhaps it might; but by subsequent Acts that is made much more clear. After *The Manchester and Leeds Railway Company*, under stat. 7 & 8 *Vict. c. lxxxii. s. 343.*, had purchased *The Ashton, Stalybridge, and Liverpool Junction Railway*, stat. 10 & 11 *Vict. c. lxiii.* passed. The intention of the Legislature appears, from this Act, to be that, for the future, the powers of the amalgamated Company, which had previously been under several different systems, contained in different special Acts, should be under one system: that is, the system given by the public Acts of 1845. The damage for which the plaintiffs are entitled to compensation accrued after this Act; and, that being so, the plaintiffs are entitled to proceed under stat. 8 & 9 *Vict. c. 18. s. 68.* [Lord Campbell C. J. What is the answer which is given to this way of putting it?] It is understood that the defendants propose to contend that stat. 10 & 11 *Vict. c. clxiii.* extends only to the making of branches. [Crompton J. It may perhaps be said that there are express provisions in the special Act 7 & 8 *Vict. c. lxxxii.*, and that stat. 10 & 11 *Vict. c. clxiii.* applies

the general acts only when not inconsistent with the special provisions. But the application of the general Act to claims for compensation like the present would not be inconsistent with the provisions of stat. 10 & 11 *Vict. c. clxiii.*, though it would be inconsistent with the provisions of stat. 7 & 8 *Vict. c. lxxxii.*; and the language of the exception in stat. 10 & 11 *Vict. c. clxiii. s. 4.* is "save as to such parts thereof as may be modified by or are inconsistent with the provisions of this Act;" not of these Acts.] This very case has been in the Court of Chancery (*a*): and the Master of the Rolls expressed a decided opinion that the general Act was incorporated. The Legislature, in effect, imposed on the Company who came to them for fresh powers a condition that all their Acts should be subject to the general Acts.

The second question is, whether the award is void as not having been made within three months after *Fisher* was appointed joint arbitrator. That question depends on the construction of stat. 8 & 9 *Vict. c. 18. s. 68.*; by which, where lands have been injuriously affected and the compensation claimed exceeds 50*l.*, the party "may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire," and, "unless the promoters of the undertaking be willing to pay the amount of the compensation so claimed, and shall enter into a written agreement for that purpose within twenty

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one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided." The provisions thus referred to are contained in sects. 25 to 37, inclusive. Those relate to the mode in which an arbitration is to be conducted. But sect. 23 does not relate to the mode in which an arbitration is to be conducted. It provides that, when lands are sought to be taken by the promoters, and the arbitrator appointed has not made his award within three months, the "question of such compensation shall be settled by the verdict of a jury, as hereinafter provided." But sect. 68 (which relates, not to lands sought to be taken by the promoters, but to lands already taken) gives the claimant the absolute option of having the claim settled by arbitration. [*Wightman J.* But to have it settled "in the manner herein provided." Sect. 23 applies to compensation which the land owner has a right to have settled by arbitration without the consent of the promoters; and it provides for improper delay. Why should not this provision apply as much to arbitrations under sect. 68; to settle the amount of compensation for land already taken, as to arbitrations to settle the amount of compensation for land sought to be taken? Lord *Campbell C. J.* Sect. 68 gives a summary remedy for compensation for land already taken by the promoters: but it certainly is no absurdity to say that the compensation for damage already incurred shall be settled by arbitration in the same manner as is already provided for settling compensation for prospective damage. The Legislature, in settling the manner in which compensation for land to be taken and for prospective damage should

be settled by arbitration, thought, and in my opinion wisely thought, that, upon a balance of difficulties, it was judicious to introduce a stringent provision, to induce the arbitrator to make his award with dispatch. That is done by sect. 23: it is part of the scheme of arbitration; and, when you say that under sect. 68 the arbitration is to be conducted in the manner provided in the Act, but excluding sect. 23, you seem to me to be lopping off a limb from the scheme, arbitrarily.] The words in sect. 68 give the absolute option to the claimant: "the same shall be settled by arbitration." The words "in the manner herein provided," which follow, incorporate such part of the machinery in the Act as is consistent with the claim being settled by arbitration, but exclude sect. 23, which sends the claim to a jury. [*Crompton J.* The words on which you rely occur also in sect. 23. There it is provided that, if claimants desire to have the compensation settled by arbitration, "the same shall be so settled accordingly." But these words there evidently mean that it shall be so settled subject to the provision that immediately follows; and why should not the similar words in sect. 68 bear the same meaning?]

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Knowles, contra, was not called upon.

PER CURIAM (a). It seems to us that the plaintiffs are clearly entitled to succeed on the first point, and the defendants on the second. As the nonsuit is to be entered in the event of either point being decided in favour of the defendants, we need not hear their counsel;

(a) Lord Campbell C. J., *Wightman* and *Crompton Js.* *Erle J.* was absent.

1853. and it is only necessary to notice that, though at present we have no doubt upon the first point, we have not heard it argued. This judgment will also dispose of the demurrer; in which the second point is on the record (a).

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Rule absolute to enter a nonsuit.

Judgment, on the demurrer, for the defendants.

(a) The demurrer was not argued.

Saturday,
April 23d.

The QUEEN against the Inhabitants of STAPLETON.

F. was resident in the parish of *S.* with his wife and family, in a house rented by himself. He was then hired; and the terms of his hiring required him to dwell

in the parish of *C.* He went to *C.*, and slept there every night whilst his hiring continued, which was for four years and four months: but he left his wife and family residing in the house in *S.*, for which he continued to pay the rent. He was then discharged from his hiring, and returned to his house in *S.*, where he continued to reside till removed to a third parish by an order made within five years of his return to *S.* His wife and family had never quitted the house in *S.* On appeal against the order, the Sessions decided that he had resided in *S.* for five years next preceding the order, but subject to a case, in which the above facts were stated: and the Sessions found that, whilst he dwelt at *C.*, he intended to return to *S.* whenever he should leave his situation, but did not wish to leave it, and did not do so willingly.

Held: That the question, whether on those facts *F.* resided in *S.* whilst dwelling at *C.*, was not concluded by the finding of the Sessions: and that his absence at *C.*, under a hiring which made it his duty not to return to *S.*, though he intended ultimately to return to *S.*, was not a mere temporary absence consistent with residence in *S.*, but a permanent residence in *C.*: and, consequently, that stat. 9 & 10 *Vict.* c. 66. s. 1. did not prevent his removal from *S.*

ON appeal against an order of justices, dated 25th March 1852, removing *Robert Fletcher* and his wife, from the parish of *Stapleton* in *Gloucestershire*, to the parish of *St. Pancras* in *Middlesex*, the Sessions quashed the order, subject to a case, which was substantially as follows.

For thirty years and upwards, previous to 16th *May* 1843, the said *Robert Fletcher* resided with his wife and family in divers houses in succession, for all of which he paid during the whole period rent and rates, in the said parish of *Stapleton*: and, on the said 16th *May*, he was hired as a porter by the guardians of the poor of the *Clifton* Union. While he was so hired as such porter, he resided and slept every night, as his duty was in conformity with his said hiring, in the workhouse of the *Clifton* Union, in the parish of *Clifton* in the City of *Bristol*, and out of the parish of *Stapleton*, for a period of four years and four months; and, during the whole time of his so residing in the workhouse of the *Clifton* Union, his wife and children continued to reside in the same house, in the parish of *Stapleton*, in which he had resided previously to his being appointed porter at the workhouse of the *Clifton* Union; and for which he always paid the rent. He was dismissed from his situation as porter at the *Clifton* Union workhouse, on the 16th day of *September* 1847; and immediately thereupon he returned to and resided in the parish of *Stapleton*, in the house so inhabited by his wife as aforesaid, and continued so to reside up to the time of the obtaining of the order of removal. On the hearing of the appeal, he stated that he always, during the time of his service at the Union workhouse, had an intention to return to the parish of *Stapleton* whenever he should leave the *Clifton* Union; but that he did not wish or desire to leave his service at the *Clifton* Union, and did not do so willingly.

The Court of Quarter Sessions decided that *Robert Fletcher* and his wife were irremovable from the parish of *Stapleton*, on the ground of his having resided therein

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for five years and upwards previous to the making of the order appealed against: and the Sessions found, as a fact, that *Robert Fletcher* always, during the time of his service at the *Clifton* Union workhouse, had an intention to return to the parish of *Stapleton*, whenever he should leave the *Clifton* Union; but that he did not wish or desire to leave his service at the *Clifton* Union, and did not do so willingly.

If the Court of Queen's Bench should be of opinion that the paupers were removeable under the circumstances above stated, then the order of the Court of Quarter Sessions is to be quashed; otherwise to be confirmed.

Pigott and *J. J. Powell*, in support of the order of Sessions. The question is, in what parish the pauper, *Robert Fletcher*, "resided for five years next before the application for the warrant" for his removal, within the meaning of stat. 9 & 10 *Vict. c. 66. s. 1.* Residence is a question of fact; and the Sessions have determined the question in this case by their finding. [Lord *Campbell* C. J. The Sessions have found the facts as to where the pauper was, and what he intended; but the question whether on those facts the pauper was resident in the one parish or the other is a question of law, on which their finding is not conclusive, and which is properly submitted to us.] Stat. 9 & 10 *Vict. c. 66. s. 1.* cannot by residence mean personal residence. If a sailor were absent on a voyage, leaving his wife and family in his house, it would hardly be contended that he lost his privilege of irremovability. [Lord *Campbell* C. J. In that case he could hardly be said to be resident elsewhere. *Crompton* J. Can a man be resident,

within the meaning of this statute, in two parishes at once, so as to be at the same time acquiring the privilege of irremovability in each? That question arises here; for the Sessions state, in terms, that *Fletcher* resided in *Clifton* for four years and four months; and I think the facts justify the conclusion that during all that time he was acquiring the privilege of irremovability from *Clifton*. *Erle J.* But, if an absence for four years and four months from the parish where his house and family are destroys the privilege of irremovability, why should not an absence for four days produce the same effect? What we require is a definition of residence.] Residence results from the possession of a home, where the pauper's wife and family are, to which he means to return, and from which he is absent for only a particular purpose. It is unimportant, whether that temporary purpose is one which requires a longer or a shorter absence, so that it is temporary. He can have but one residence: but the question, which sleeping place is his residence, depends on the animus revertendi. It is analogous to domicile. "Resident" is a word not unlike "inhabitant." That word is defined in 2 *Inst.* 702, by Lord *Coke* in his reading on the Statute of Bridges, 22 *H. 8. c. 5. s. 3.*, and in *Rex v. Mitchell* (a). Residence also is defined in *Rex v. Sargent* (b), where the question was, what constituted a "tenant resident." [*Erle J.* The word "resident" or "inhabitant" is used in different senses according to the subject matter. In general, for the purpose of taxation, a man is resident or inhabitant where he has property. But that affords no guide here.] In *Whithorn v. Thomas* (c) *Erle J.* says that

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(a) 10 *East*, 511. See *Rex v. Mashiter*, 6 *Ad. & E.* 153.

(b) 5 *T. R.* 466.

(c) 7 *M. & G.* 1. 10.

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residence conveys the idea of home. He adds: "The fact of sleeping at a place, indeed, by no means constitutes a residence—though, on the other hand, it may not be necessary for the purpose of constituting a residence in any place to sleep there at all. If a man's family are living in a borough, and he is absent for six months, but with the intention of returning, he will be still considered as residing there." [Erle J. That was not intended as a general definition of residence. I doubt if you will find such a definition anywhere; but I am sure you will not find it given by me; for it has been a desideratum to me for many years; and I never could find or frame a definition satisfactory to my mind]. Under any circumstances, the intention to return must be nearly decisive; *Regina v. Tacolnestone* (a). Much importance was also attributed to the intention to return in *Regina v. Halifax* (b). [Lord Campbell C. J. An order of removal breaks the residence because it takes away the right to return; in *Regina v. Tacolnestone* (a) there was the intention and the right to return. In *Regina v. Halifax* (b) there was the intention without the right. In the present case the pauper could not return during his hiring without a breach of contract.]

Pashley (with whom was *A. M. Skinner*), contra. The facts here shew that the pauper had no intention to return to *Stapleton*, unless he was turned away. The desire to return at some indefinite period cannot make a man resident. The argument for the other side would be as good at the end of fifty years' absence as at the end of an absence of four years and four months. (He was then stopped by the Court.)

(a) 12 Q. B. 157.

(b) 12 Q. B. 111.

Lord CAMPBELL C. J. I am of opinion that the pauper was not irremovable. I do not think that we are precluded from entering into the question by any finding of the Sessions. They have found the facts, and on those facts have come to the conclusion that *Robert Fletcher* had resided in *Stapleton* for the five years: but it is a conclusion of law; and we are to say whether on those facts he had, within the meaning of this Act, resided there for five years next before the application for the warrant, which was within five years of his return from *Clifton*.

Then I should be glad to be able to lay down a general definition of residence, applicable to all cases: but I hazard none. I have never heard one of general application. I cannot adopt those suggested by the counsel for the respondents. They liken residence to domicile, and say that the domicile of *Fletcher* was in *Stapleton* whilst he was bodily in *Clifton*. But residence and domicile are not the same thing. A man may be resident in one country and domiciled in another: that is a fixed principle of international law recognized in all countries. Neither can the intention to return be decisive upon the question. See what absurdities it would lead to, if we were to say that an intention to return at any remote period rendered a permanent absence not a change of residence. We may suppose the case of a man hired to go to *Australia*, there to serve as a shepherd for a long term of years, and who does, according to his contract, go there and live there, but *bonâ fide* means to return to his former habitation in this country when the term for which he is hired shall have expired, say twelve years hence. Could it be said that during these twelve years he was resident at that former habi-

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tation, when in fact he was all the time on the other side of the globe? I can go no further in giving a definition than is necessary for the decision of this case. I think, when a man is absent for a temporary purpose, with an intention to return when that temporary purpose is served, as, for instance, when he is absent for a week's work in another parish, meaning to come back at the end of the week, it is no break in his residence. The phrase "temporary purpose" is not very definite; still I think it may in each case be known whether the purpose was temporary or not. Here the pauper was hired elsewhere (it is not stated for what period); and he did not intend to return when a temporary purpose was served, but to remain so long as his engagement continued. It is found in terms that he resided in *Clifton*, and properly so found; for he could not have left it without a breach of contract. And I beg that it may be understood that I attach great weight to the fact that his duty, in conformity with his hiring, required him to remain in *Clifton*, so that, whilst the hiring continued, he could not return to *Stapleton* without a breach of contract. The word "residence" in one statute may have a different meaning from what it bears under another. On the facts of this case, more especially the contract which made it not lawful for *Fletcher* to return, and the intention not to return so long as he could continue in his situation, I think that he was not resident in *Stapleton*, within the meaning of the word as used in stat. 9 & 10 *Vict. c. 66. s. 1.*

ERLE J. (a). We are called upon to say what constitutes a break in the five years' residence which would

(a) *Wightman J.* was absent.

render a pauper irremovable. The word residence has various meanings, and is used in different statutes in different senses. In the statutes for the Relief of the Poor, down to stat. 9 & 10 *Vict. c. 66.*, the prevailing idea with reference to which the word was used was the residence for forty days of a person coming to settle in a parish. It is clear that this cannot be the idea of residence in stat. 9 & 10 *Vict. c. 66. s. 1.*; and I should not mention it, but that the statute is one of the class in which that is the prevailing idea. Here the pauper, having a house in *Stapleton* in which he and his family resided, went to *Clifton*, but left his family in his house: and, if the case had merely found that his absence was with intent to return to *Stapleton*, I should have said there was no break in his residence in that parish. But we must look at all the facts. He entered into a contract obliging him to remain in another parish, and to dwell there; and he did remain and dwell there for the purpose of earning his livelihood under that contract, intending to remain for an indefinite period, as long as he could earn his livelihood under that contract. I think that during that time he was resident in the parish in which he was earning his livelihood, and in which he was bound by his contract to dwell.

CROMPTON J. It is clear that the pauper did not personally reside in *Stapleton* during the period when he dwelt at *Clifton*. The question therefore comes to be, whether, in construction of law, he resided there. The Sessions have in different parts of the case found that he was residing in both parishes at the same time; and he had in fact two dwelling places, one in each parish. Whenever such is the case, I think

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the question will always be, Which of the two dwelling places is the permanent residence? I do not think that any more definite guide can be given than by the use of the words permanent and temporary. An absence for a mere temporary purpose with an intention to return will be no break in the residence. But an intention to return at a remote period, after a permanent absence, is not sufficient to prevent the absence from being a break. When the animus revertendi merely means that, though the absent person has what amounts to a residence elsewhere, it is his intention to return when that residence is at an end, I think that the animus revertendi cannot be said to make his absence temporary and not permanent.

Order of sessions quashed.

Saturday,
April 23d.

The QUEEN against The GREAT WESTERN RAIL-
WAY COMPANY.

Ex parte FISHER.

Mandamus to a railway Company to make a line, authorized by an Act. The time limited

MANDAMUS. The writ recited the provisions of "The *Wilts, Somerset and Weymouth* Railway Act, 1845" (8 & 9 *Vict. c. liiii.*) (a), of "The *Wilts, Somerset and*

for the exercise of the compulsory powers for acquiring had expired. The writ contained a suggestion that the defendants had given notices, and made contracts, by virtue of which they were "either actually in possession of, or entitled to acquire the fee simple in possession of, all the lands required for the purpose of constructing" the line. Return: That the defendants were not nor are "either actually in possession, or entitled to acquire the fee simple or possession, of all the land required for the purpose of constructing" the line.

Held: that the return was bad in substance, as, consistently with its truth, the defendants might have it in their power to purchase the part of which they were not possessed: and therefore that the return did not shew inability.

(a) Local and personal, public. Royal Assent 30 June 1845.

Weymouth Railway Amendment Act, 1846" (9 & 10 *Vict. c. cccxiii.*)(a), and of "The *Wilts, Somerset and Weymouth Railway Deviation Act, 1847*" (10 & 11 *Vict. c. lx.*)(b). From the writ it appeared that, under the first of these Acts, *The Wilts, Somerset and Weymouth Railway Company* was incorporated, and had the usual powers to make certain lines of railway; and that, by the second and third of these Acts, the Company was authorized to make other portions of lines forming part of the same schemes. The Acts, as set out, contained the usual power to take lands within three years of the passing of the Acts respectively; and each Act incorporated the general Acts of 1845. The writ contained suggestions that, by a warrant from the Railway Commissioners, under the powers given by stat. 11 & 12 *Vict. c. 3.*, the time for the exercise of the powers given by these three Acts respectively to *The Wilts, Somerset and Weymouth Railway Company*, was extended, in each case for two years. The writ then recited the provisions of "The Great Western Railway Act, 1851" (14 & 15 *Vict. c. xlviii.*)(c), whereby *The Wilts, Somerset and Weymouth Railway Company* was dissolved, and its powers and obligations vested in *The Great Western Railway Company*. The writ then contained a suggestion that, in exercise and execution of the powers of the thereinbefore recited Acts respectively enabling them in that behalf, *The Wilts, Somerset and Weymouth Railway Company* had previously to the passing of the said last mentioned Act, and *The Great Western Railway Company* since the passing thereof have, proceeded from time to time in the con-

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- (a) Local and personal, public. Royal Assent, 3 August 1846.
 (b) Local and personal, public. Royal Assent, 25 June 1847.
 (c) Local and personal, public. Royal Assent, 3 July 1851.

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struction of the said railways: that a part of the line described "is now completed and open to public traffic," "(being more than one half of the whole line) and that" another part described "is now completed and open to public traffic;" "and that" another part described "has been for some time completed, with the exception of the laying down of a portion of the rails, and that the same might within a short space of time be entirely finished and opened for public traffic. And" "that the said *Wilts, Somerset and Weymouth Railway Company*, at various times previously to the passing of The Great Western Railway Act, 1851, and under and by virtue of the powers granted to the said Company by the hereinbefore mentioned Acts of Parliament in that behalf, took steps towards the making of the said line of railway hereinbefore mentioned" (the uncompleted part); "and that the intended line of such said railway has been set out by them throughout its whole extent; and that, before the expiration of their compulsory powers for the purchase of lands under The *Wilts, Somerset and Weymouth Railway Amendment Act*, 1846, and The *Wilts, Somerset and Weymouth Railway Deviation Act*, 1847, and in exercise and execution of their powers under the said Acts, they duly served upon nearly the whole number of the owners and parties interested in the said lands required for the purpose of constructing such railway, as the same is authorized to be constructed under the said last mentioned Acts, good and sufficient notices, such as by law are required in that behalf, in order to enable the said Company to purchase and take such lands in a compulsory manner; and that they have actually purchased and made contracts and agreements for the purchase of the fee simple of all the residue of

the lands so required: by virtue of which said notices and of the said purchases and agreements, or some of them, the said Company were, at the time of the passing of The Great Western Railway Act, 1851, either actually in possession of, or entitled to acquire the fee simple in possession of, all the lands required for the purpose of constructing the said railway, so commencing and terminating as last aforesaid (according as the same is authorized to be constructed by The *Wilts, Somerset and Weymouth* Railway Amendment Act, 1846, and The *Wilts, Somerset and Weymouth* Railway Deviation Act, 1847), without any further exercise of the compulsory power for the purchase of land conferred upon them by the said hereinbefore recited Acts." The writ then contained suggestions of the lapse of a reasonable time for making the line, of the approach of 3d *August* 1853, on which day the powers for making it would expire, and of the importance of the line to the public, and to *Henry Fisher* and *John Fisher*, landowners on the line; and commanded *The Great Western Railway Company* to complete the line from *Bradford* to *Barhampton*. It appeared from the descriptions in the writ that part of the uncompleted line was authorized by the Acts of 1845 and 1846, and a part by the Act of 1847. The teste of the writ was 12 *June* 1852.

Return: That the annexed writ came to us on the 3d day of *August* in the year of our Lord 1852, and not before; and that the period by The *Wilts, Somerset and Weymouth* Railway Amendment Act, 1846, limited, and by the warrant of the Commissioners of Railways extended as in the said writ mentioned, for the compulsory purchase of the lands by The *Wilts, Somerset and*

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Weymouth Railway Amendment Act, 1846, authorized to be taken for the purposes of that Act, so far as relates to the lands required for the purposes of the said line of railway by the said Act authorized to be made from part of the line not completed, "expired before the issuing of the annexed writ, to wit on the 3d day of *August* in the year of our Lord 1851. And that the said *Wilts, Somerset and Weymouth Railway Company*, at the time of the passing of the *Great Western Railway Act, 1851*, to wit on the 3d day of *July* in the year of our Lord 1851, were not, nor were we *The Great Western Railway Company* at any time from the time of the passing of the said last mentioned Act hitherto, nor are we now, either actually in possession, or entitled to acquire the fee simple in possession, of all the lands required for the purpose of constructing the said railway commencing and terminating as aforesaid, according as the same is authorized to be constructed as aforesaid. And that the time between the 3d day of *August* in the year of our Lord 1852 and the said 3d day of *August* in the year of our Lord 1853 was not, nor is, a sufficient time for the making and completing of the said railway, commencing and terminating as aforesaid. And that we, the said *Great Western Railway Company*, could not and cannot make and complete the same on or before the 3d day of *August* in the year last aforesaid."

Demurrer to the return (except as to the part averring that there was not sufficient time to make the line, which was traversed)(a), assigning as causes, amongst others, that the return traversed an inference of law. Joinder in demurrer.

(a) The issue in fact was tried, before *Crompton J.*, at the last Assizes for *Somersetshire*, when the verdict passed for the Crown.

Crowder, for the Crown. The return assumes that the prosecutors are bound to shew that the Company were, at the time of the writ, entitled to the possession in fee simple of all the lands requisite to make the line. But that might be disproved by shewing that a part of the land was not actually obtained, though it might be obtained either by bargain, or under the powers of The *Wilts, Somerset and Weymouth Deviation Act, 1847*, the powers of which did not expire till after the date of the writ. The return, therefore, contains too large a traverse. Such an objection is open upon general demurrer; *Palmer v. Ekins* (a), *Smith v. Lovell* (b). The return is also bad on special demurrer, as traversing the conclusion in law arising from the previous averments that notices had been given. [Lord *Campbell* C. J. A mere inference of law is not traversable; but is this a mere inference of law? *Crompton* J. Is it not rather that the material allegation in the writ is that the Company are entitled to the land, and that the prosecutors have unnecessarily, in a circuitous form, shewn how they propose to prove that allegation?]

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Butt, contra. The return properly traverses the material allegation, which is the power to take the possession in fee simple. Without that power the defendants could not make the line: and any return shewing that they cannot comply with the writ is good; *Regina v. Ambergate &c. Railway Company* (c).

Crowder, in reply. The return is not good unless it

(a) 2 *Str.* 817.(b) 10 *Com. B.* 6.(c) *Ante*, p. 372.

1853. shews that compliance is in no way possible ; *Regina v. The QUEEN Great Western Railway Company (a).*

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LORD CAMPBELL C. J. The question on this record is, whether a peremptory mandamus ought to go. I think it ought, and that it is not necessary to give an opinion on the effect of the form of the traverse of the suggestion ; for this return does not shew that it is out of the power of the Company to comply with the command in the writ. Now a party commanded to fulfil a legal duty is bound to obey the command, or make a return shewing inability to perform his legal duty. *The Great Western Railway Company* may have it in their power to obtain all the lands, required and not in their possession, by voluntary conveyances. The return does not negative this, and therefore shews no inability to comply with the command in the writ.

ERLE J. (b). My judgment is (assuming, for the purpose of this cause (c), that there is a legal obligation to complete the line) that the return is bad ; for a return is not good unless it shews inability to perform the legal duty of the party. The substance of the return here is, that the compulsory powers for taking lands have expired ; and that the Company are not in possession or entitled to acquire the fee simple in possession of all the lands requisite. I think this is not enough. The return should go on to say that they have endeavoured to acquire the land wanting by agreement (which would have been a lawful mode of acquiring it), and that they

(a) Ante, p. 253.

(b) *Wightman J.* was absent.

(c) See note at the end of the case.

have been unable to do so; and so the return would have shewn that they were unable to fulfil their duty.

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CROMPTON J. If it had been necessary to decide on the form of the traverse, I should have been inclined to say it was bad, as being too large, and not bad as traversing any inference of law: but the substance of the return is bad. It ought to go on to say, not only that the Company have not acquired the land, but that they cannot acquire it. The return, as it stands, is consistent with there being only a single field which the Company have not yet got, but which they could easily acquire if they pleased. The return is therefore bad in substance, as it does not shew inability.

Peremptory mandamus awarded (a).

(a) When the case was called on it was proposed that, as the sufficiency of the writ was involved in the question, the argument should be postponed till after the decision of *York and North Midland Railway Company v. The Queen*, then standing for judgment, in the Court of Exchequer Chamber, on error from the decision of this Court in *Regina v. York and North Midland Railway Company*, ante, p. 178. The counsel for the prosecutors stated that the language of the special Acts, in this case, was not the same as usual, and that he should endeavour to distinguish this case from *York and North Midland Railway Company v. The Queen*, assuming that the judgment of the Queen's Bench was to be reversed on the ground that the usual language of such Acts was permissive; and also that it was intended in that event to carry this case to the House of Lords. It was then suggested by the Court that the case should be argued on the assumption that the writ was good, leaving the sufficiency of the writ as a question for the House of Lords. This arrangement was acceded to. The judgment in *Regina v. York and North Midland Railway Company* was afterwards reversed, April 29, 1853. See post.

1853. shews that compliance is in no way possible; *Regina v. Great Western Railway Company* (a).

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LORD CAMPBELL C. J. The question on this record is, whether a peremptory mandamus ought to go. I think it ought, and that it is not necessary to give an opinion on the effect of the form of the traverse of the suggestion; for this return does not shew that it is out of the power of the Company to comply with the command in the writ. Now a party commanded to fulfil a legal duty is bound to obey the command, or make a return shewing inability to perform his legal duty. *The Great Western Railway Company* may have it in their power to obtain all the lands, required and not in their possession, by voluntary conveyances. The return does not negative this, and therefore shews no inability to comply with the command in the writ.

ERLE J. (b). My judgment is (assuming, for the purpose of this cause (c), that there is a legal obligation to complete the line) that the return is bad; for a return is not good unless it shews inability to perform the legal duty of the party. The substance of the return here is, that the compulsory powers for taking lands have expired; and that the Company are not in possession or entitled to acquire the fee simple in possession of all the lands requisite. I think this is not enough. The return should go on to say that they have endeavoured to acquire the land wanting by agreement (which would have been a lawful mode of acquiring it), and that they

(a) Ante, p. 253.

(b) *Wightman J.* was absent.

(c) See note at the end of the case.

have been unable to do so; and so the return would have shewn that they were unable to fulfil their duty.

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The QUEEN
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WESTERN
Railway
Company.

CROMPTON J. If it had been necessary to decide on the form of the traverse, I should have been inclined to say it was bad, as being too large, and not bad as traversing any inference of law: but the substance of the return is bad. It ought to go on to say, not only that the Company have not acquired the land, but that they cannot acquire it. The return, as it stands, is consistent with there being only a single field which the Company have not yet got, but which they could easily acquire if they pleased. The return is therefore bad in substance, as it does not shew inability.

Peremptory mandamus awarded (a).

(a) When the case was called on it was proposed that, as the sufficiency of the writ was involved in the question, the argument should be postponed till after the decision of *York and North Midland Railway Company v. The Queen*, then standing for judgment, in the Court of Exchequer Chamber, on error from the decision of this Court in *Regina v. York and North Midland Railway Company*, ante, p. 178. The counsel for the prosecutors stated that the language of the special Acts, in this case, was not the same as usual, and that he should endeavour to distinguish this case from *York and North Midland Railway Company v. The Queen*, assuming that the judgment of the Queen's Bench was to be reversed on the ground that the usual language of such Acts was permissive; and also that it was intended in that event to carry this case to the House of Lords. It was then suggested by the Court that the case should be argued on the assumption that the writ was good, leaving the sufficiency of the writ as a question for the House of Lords. This arrangement was acceded to. The judgment in *Regina v. York and North Midland Railway Company* was afterwards reversed, April 29, 1853. See post.

1853.

Monday,
April 25th.

JOHN HOLMES *against* RICHARD BAGGE and
THOMAS FLETCHER.

Trespass for assault. Plea: that defendant and twenty one others were possessed of a close, and were thereon lawfully playing a lawful game at cricket: that plaintiff came unlawfully on the close, and interrupted defendant and the twenty one in playing the lawful game, whereupon defendant, in his own right and by authority of the twenty one, requested him to depart from the close, and desist from disturbing their game, which he refused: whereupon defendant removed him out of the close. De injuriâ.

The facts were that defendant and twenty one others were playing, but were not otherwise possessed of the field: and plaintiff interrupted them by remaining on the ground, occupied by the players, when requested to leave it.

Held: that the plea justified the trespass in right of the possession of the close, and was therefore not proved. *Semle*, that the facts might have constituted a justification in defence of the lawful game, if so pleaded.

By agreement between A., owner of a close, and the members of a committee of a cricket club, A. agreed to let to the committee, and the committee to hire, the close, to be used as a cricket ground by the club, and for that purpose only. Plaintiff and defendant were members of the committee. Plaintiff having sued defendant for an assault in removing plaintiff from the close, defendant pleaded possession of the close in himself and justified the removal: plaintiff replied that he and defendant were jointly possessed. Held, that the facts supported this replication.

TRESPASS. The declaration contained counts for two assaults. Pleas: 1. Not Guilty. Issue thereon. 2. To the first count: That plaintiff was unlawfully in a close of which defendant *Bagge* was possessed; that plaintiff refused to depart when requested; and *Bagge* in his own right, and *Fletcher* as his servant, gently laid their hands &c. 3. To the second count: a plea similar to the 2nd plea to the first count. 4. To the first count: a similar plea, but laying the possession of the close in *Bagge* and ten others named. 5. To the second count: a plea similar to the 4th plea to the first count. 6. To the first count: that *Bagge* and ten others named, being eleven members of a cricket club, called *The Lynn Cricket Club*, and eleven others named, being eleven members of a cricket club called *The Lytcham Cricket Club*, "were lawfully possessed of a certain close," and were lawfully playing a certain

lawful game or match at cricket in the said close ; and plaintiff was "unlawfully in and upon the said close," and "vexatiously and unlawfully interrupted, hindered and prevented" *Bagge* and the other twenty one persons "in and from any longer playing the said lawful game:" whereupon *Bagge*, in his own right and by the authority of the other twenty one persons, and *Fletcher*, as *Bagge's* servant, requested plaintiff "to depart from and out of the said close, and to desist from interrupting" the playing: which plaintiff refused to do: whereupon *Bagge* and *Fletcher* gently laid their hands upon plaintiff "in order to remove, and did remove, him from and out of the said close in this plea mentioned." 7. To the second count: a plea similar to the 6th plea to the first.

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Replications: To the 2nd, 3d, 4th and 5th pleas, respectively, that plaintiff was joint tenant with *Bagge* and others of the closes in those pleas respectively named, and was jointly possessed thereof. Rejoinders: traversing these averments respectively. Issues thereon. To the 6th and 7th pleas: De injuriâ. Issue thereon.

At the trial, before Lord *Campbell* C. J., at the last *Norwich* assizes, it appeared that plaintiff and defendant *Bagge* were both members of the committee of *The Lynn Cricket Club*. The owner of the close mentioned in the pleas was *W. S. Rolin*; and he had signed an agreement with the committee, of which the material parts were as follows. "The said *W. S. R.* agrees to let unto the said committee, who accordingly hereby agree to hire, all that" &c., "now in the occupation of the said *W. S. R.*, to be used as a cricket field by the members of the above named club, and for that purpose only, at the annual rent of 10*l.*" "The committee to

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do all that may be necessary for keeping the ground in proper playing condition, at their own expense. The tenancy under this agreement to be determinable at the end of any current season, on notice in writing to that effect being given by either party on or before the 29th September."

On the day of the alleged assault, there was a match between the eleven of *The Lynn Cricket Club*, of which eleven defendant *Bagge* was one, and plaintiff was not one, and the eleven of *The Lytcham Cricket Club*. The match was played on the close in question; and the spectators left a clear space round the players, which was, as the jury found, "tabooed" to all but the players. During the innings of *The Lytcham Cricket Club*, one of the *Lynn* eleven retired for a temporary purpose; and the plaintiff, who was among the spectators, was requested to take his place. He complied, but did not take off his coat. *Bagge*, who was captain of the *Lynn* eleven, told him to do so: offence was taken at the tone in which the command was given; and the plaintiff would neither take off his coat nor leave the "tabooed" spot. He was then, by the direction of the defendant, forcibly removed from the "tabooed" ground; and the assaults were committed in so removing him. The Lord Chief Justice, on proof of those facts, was of opinion that, the assaults in fact being clearly made out, the issue upon Not guilty must be found for the plaintiff, and that none of the other pleas were made out. He took the opinion of the jury as to whether the twenty two were lawfully playing at cricket, and whether the plaintiff disturbed them. The jury said they were lawfully playing, and plaintiff disturbed them by remaining on the tabooed ground. The Lord Chief Justice thereupon directed a verdict for the

plaintiff, but reserved leave to enter a verdict on the 6th and 7th issues for the defendant, if the Court should be of opinion that the part of those pleas proved constituted a defence.

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Byles Serjeant, in this term (a), moved for a rule Nisi to enter the verdict on the 6th and 7th issues, pursuant to the leave reserved, or for a new trial on the ground that the jury ought to have been directed to find the 2d, 3d, 4th and 5th issues for the defendants.

As to the misdirection: the agreement as to the letting of the field did not operate so as to take the legal right to the possession out of *Rolin*. It is not a lease of the exclusive possession of the land, but an agreement to permit the enjoyment of a particular easement. That being so, if the plaintiff had taken issue on the averment in the 2d plea that *Bagge* was possessed of the close, he must have succeeded; for the possession was in *Rolin*. But, instead of doing so, he confesses *Bagge's* possession, and replies that he, the plaintiff, was jointly possessed with *Bagge*: and issue is joined on that replication. But the plaintiff was not jointly possessed with *Bagge*; for neither were possessed. The whole was in *Rolin*. Therefore this and the similar issues were not proved by the plaintiff.

Then, as to the sixth and seventh pleas: it is true that the twenty two were not possessed of the close, and that allegation must be struck out of the plea: but enough will then remain to justify the trespasses.

Cur. adv. vult.

(a) April 19th. Before Lord Campbell C. J., *Wightman*, *Erie* and *Crompton* Js.

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Lord CAMPBELL C. J. now delivered judgment. This was a case tried before me at the last Assizes at *Norwich*, when the verdict passed for the plaintiff. My brother *Byles* has moved for a rule *Nisi* for a new trial, on the ground that the 2d and other similar issues should not have been directed to be found for the plaintiff, and to enter a verdict for the defendants on the 6th and 7th issues. The 2d and other similar issues arise on the pleas justifying on the ground that the defendant *Bagge* was possessed of the close; and the issues taken are on the allegation, in the replications, that the plaintiff was jointly possessed with the defendant *Bagge*. We think those issues were sufficiently proved for the plaintiff by the agreement, by which all the interest in the premises, which was conveyed by *Rolin*, was vested in the plaintiff jointly with *Bagge*. As to the 6th and 7th pleas, they set up that the twenty two persons named were lawfully possessed of a close, and lawfully playing cricket there, that plaintiff wrongfully remained on the close, and interrupted the playing, and, though requested to depart from the close and to desist from the interruption, would not do so; whereupon the defendants gently laid their hands on him "in order to remove, and did remove, him from and out of the said close." Now, no doubt a plea might have been framed to meet the facts, so as to have entitled the defendant to a verdict; for according to the evidence the two elevens were lawfully playing; and, as the jury found, the space round the wickets was tabooed, and the plaintiff came into that tabooed space, and persisted in remaining there though requested to go. And it may be that it would be a good justification that they removed him for disturbing persons lawfully playing

at a lawful game; and, if such had been the justification here, the plea would have been proved. But such is not the language of this plea; it avers that the twenty two persons named were possessed of the close, and that the plaintiff was removed from the close, because he would not leave it. Therefore the plea justifies the trespasses on the ground that the twenty two were possessed of the close, and committed the trespasses in defence of their possession. Now, in fact, the twenty two were not possessed. It was the cricket field of the *Lynn Cricket Club*; and eleven out of the twenty two were strangers, invited by the *Lynn Cricket Club* to come there as guests to play. They were in no sense possessed of the field. Therefore the justification, as pleaded, fails; and those issues were rightly found for the plaintiff.

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Rule refused.

In the matter of the Appeal of HUNTLEY *against* Monday,
The Churchwardens and Overseers of the April 25th.
Parish of BINBROOKE and others.

MELLOR, in last *Hilary* term (28th *January*), obtained the following rule.

“Upon reading a rule of this Court, made on the 12th day of *June* in the last *Trinity* term, whereby it was ordered that two several orders of Sessions, made

Where an award is referred back by the Court to the arbitrator, for the purpose of a specific alteration in, or addition to, such award (as

the determination of the amount of costs, awarded by him to be paid by one of the parties), he is not bound to hear further evidence on the general merits, discovered and tendered after the making of the original award.

Although, upon such reference back, he makes an award on all the points referred (identical with the first award except in respect of the insertion of the amount of costs), as if it were the first award, and does not notice the reference back.

1853. at the General Quarter Sessions of the Peace, held at
Spilsby, in and for the parts of *Lindsey* in the county of

Re *Lincoln*, on the 15th and 26th days of *January* last (a),
HUNTLEY. upon the appeal of *John Thomas Huntley*, Clerk, against
an assessment for the relief of the poor of the parish of
Binbrooke in the said county, should be and were entered
and made a rule of this Court, and upon reading the
several affidavits of" &c., "and the award thereby referred
to, filed the last *Michaelmas* term, and a rule of this
Court made the 23d day of *November* last, and the several
affidavits of" &c., "and the paper writing or copy award
thereby referred to, It is ordered that the first day of the
next term be given to the churchwardens and overseers
of the poor of the parish" (naming them) "to shew
cause why the award of *Frederic Philip Maude*, Esq.,
barrister at law, made on the 8th day of *January* 1853,
in the matters of the said appeal, should not be set aside,
on the ground that the said *F. P. M.*, the arbitrator,
declined, on the matters of the said appeal being referred
back to him by the said rule of the 23d day of *November*
last, to hear evidence tendered on behalf of the said
appellant."

From the affidavits upon which the rule was obtained,
it appeared that one of the deponents, *John Thomas
Huntley*, clerk, who was incumbent of the parish of
Binbrooke in *Lincolnshire*, had appealed, as mentioned in
the rule, against a poor rate, made on 3d *October* 1851.
One of the grounds of appeal was that certain parties
were occupiers of lands which, as appellant alleged,
were part of the parish itself, and had therefore been
wrongly omitted in the assessment. Notice of appeal
was given to such occupiers, as well as to the parish

officers. The appeal came on for hearing, at the Quarter Sessions, on 15th *January* 1852; and, the plaintiff having abandoned two of his grounds of appeal, an order was made, in pursuance of stat. 12 & 13 *Vict. c. 45. s. 13.*, with the consent of all parties, that all other matters of the appeal should be referred to arbitration; the arbitrator to "have the same power and discretion as to all matters referred, including costs, as are vested in the Court of Quarter Sessions."

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HUNTLEY.

At the adjourned Sessions, on 26th *January* 1852, with the consent of all parties, a second order was made appointing Mr. *Maude* to be the arbitrator. These two orders of Sessions were, on 12th *June* 1852, made a rule of Court, on the application of the respondents. On 10th *June* 1852, the arbitrator made his award, which, after reciting the previous proceedings connected with the appeal, ran as follows:

"I award and order that the said appeal be, and the same is hereby, dismissed, and that the said assessment be confirmed; and the same is hereby confirmed accordingly; and that the said appellant shall pay his own costs of the said appeal and of this reference; and that he shall, within one month after this my award shall have been entered as the judgment of the said Court of Quarter Sessions in the said appeal, pay to the said respondents their costs of the said appeal, and of this reference. In witness" &c.

On 6th *November* 1852, the Court of Queen's Bench granted a rule, on the motion of the respondents, to shew cause "why the matters of the said appeal which by the said orders of Sessions were referred to *F. P. M.*" &c. "should not be referred back to the said *F. P. M.*, or why the said award made by him in pursuance of

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such orders of Sessions should not be set aside, on the ground that the said arbitrator, the said *F. P. M.*, has not in and by his said award ascertained and adjudged the amount of costs to be paid by the said appellant to the said respondents, and why, in the event of the said award being wholly set aside," the Court of Quarter Sessions "should not enter continuances and hear the said appeal, pursuant to the statute in such case" &c.

On 23d *November* 1852, counsel having been heard for and against the rule, the Court made an order directing "that the matters of the said appeal" "be referred back to the said *F. P. M.*, on the ground that the said arbitrator, the said *F. P. M.*, has not in and by his said award ascertained and adjudged the amount of costs to be paid by the said appellant to the said respondents."

On 11th *December* 1852, the appellant was served with a copy of an appointment by the arbitrator for proceeding in the reference on 18th *December*: and on 13th *December* the arbitrator was served with a notice by the appellant, stating that, "upon the further hearing of this appeal under the rule obtained for referring back the award," the "appellant claims to be allowed, and proposes to give, additional evidence touching the matters of the said appeal, and particularly touching the lands alleged to have been taken" &c., and "claims to be present and be heard in any proceedings to be had and taken before you, as such arbitrator as aforesaid, by the said respondents, any or either of them, under the said rule so obtained as aforesaid." It appeared, from an affidavit of the appellant, that such additional evidence had been discovered since the making and publication of the award.

On 18th *December*, application was made to the arbitrator, on the part of the appellant, to allow the additional evidence in question to be heard; to which application, as well as to a subsequent application for further time for the purpose of enabling appellant to produce such additional evidence, the arbitrator refused to accede. No evidence was actually tendered by appellant on these occasions; nor was any intimation made as to the nature of it. From the affidavit, however, of the appellant, above referred to, it appeared that it was connected with the rateability of some of the lands before alleged by him to be within the parish.

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HUNTLEY.

On 8th *January* 1853, the arbitrator made a second award, following the form of the previous award, but adding, after the words "and of this reference," the words following: "and I adjudge and ascertain that the costs of the said respondents, to be paid by the said appellant, as aforesaid, amount altogether to the sum of 750*l.*; that is to say" &c. (stating the amount of the costs of the several parties who had appeared against the appellant during the proceedings).

Willmore (with whom were *Macaulay*, *G. Hayes* and *Manisty*, for several parties) now shewed cause against the rule, on behalf of the parish officers. First, the arbitrator had no power to enter upon the examination of additional evidence. His functions as an arbitrator ceased entirely as soon as he had made his first award; and the order to refer back revived them only so far as regarded the particular purpose for which such reference back was made; *Bird v. Penrice* (a). He was not even bound to give the parties notice to attend before him;

(a) 6 *M. & W.* 754.

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Howett v. Clements (a). But, secondly, it is immaterial, as regards the present case, whether he had such power or not. At all events he had a discretion to admit or refuse to receive additional evidence. [Lord Campbell C. J. If the arbitrator has reasonably fulfilled the intention of the Court, we will not set aside the award upon such a ground.] *Ringer v. Joyce* (b) shews that the Court leaves a matter of this kind entirely in the discretion of the arbitrator. [Lord Campbell C. J. If he has ascertained and adjudged the amount of costs, he has done all that we directed him to do. The case appears to me a very simple one; but we will hear the arguments on the other side.]

Mellor and Boden, contra. The arbitrator ought to have received the fresh evidence. His second award must be considered as a fresh award altogether: it assumes to be so, by its form: it makes no mention whatever of the first. [Wightman J. Does it vary from the first at all?] Only in the insertion of the amount of costs. If the Court had intended to confine the arbitrator strictly to amending the award in that one particular, the order to refer back would have so confined him specifically. In *Nicholls v. Warren* (c) it was held that, where an award is referred back to the arbitrator for reconsideration, the arbitrator is bound to hear fresh evidence, if tendered. [Wightman J. In that case there is nothing to shew that the order referring back the award may not have been in general terms: the present order expressly states the particular ground for referring back. Lord Campbell C. J. Was there in this case any

(a) 1 Com. B. 128.

(b) 1 Marshall, 404.

(c) 6 Q. B. 615.

refusal to hear evidence upon the original arbitration?] No: the evidence which was tendered was discovered after the first award was made. [*Wightman* J. Then you should, on that ground, have applied to have the award referred back generally.] The reference back was made on the application of the opposite party. The reference is general: the rule absolute, as a matter of course, states the ground on which the rule *Nisi* for referring back the award was applied for, but does not direct or confine the arbitrator to that point alone for reconsideration. [Lord *Campbell* C. J. There is a great difference in that respect between setting aside an award altogether, and referring it back for correction in one particular point. *Wightman* J. Here the award is certainly not set aside. Lord *Campbell* C. J. The appellant is now in the same position as he would have been in if the arbitrator, in his first award, had at once adjudged the amount of costs.] But, if the award be once sent back, the appellant has a right to tender evidence, just as if no award at all had been made.

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Lord CAMPBELL C. J. If the refusal to receive further evidence, which is complained of, had occurred at the original arbitration, I think the appellant would be entitled to have the rule made absolute: the objection would have been to the whole award; and the appellant might have taken this opportunity of urging it, upon the award being completed. But to the original award this objection could not have been truly made; and that award was perfect except in respect of the omission to determine the amount of costs. Upon such original award being referred back to the arbitrator for a specific

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purpose, he had a right to refuse to hear further evidence. The appellant stands now just as if the amount of costs had been adjudged and stated in the first award. The purpose for which the award was referred back has been fulfilled; and the arbitrator has in substance, at all events, complied with the directions of the Court. It is an error to suppose that the award is set aside by being referred back. In point of form, indeed, the arbitrator has made a totally new award; and that was, in my opinion, better than attempting to botch up the first award. But he was not called upon to reopen the case: the original finding stands good as far as it goes; and the corrected award is not invalidated by a refusal on the part of the arbitrator to take into consideration matters which were not referred back to him by the Court.

WIGHTMAN J. I am of the same opinion. When the rule *Nisi* for referring back the award was made absolute, the only point assumed, in the course of argument, by either party, as a ground for so referring back, was the omission with respect to the amount of costs. Had there been any other ground, that should have been then mentioned. In fact, the additional evidence in question had not then been discovered. The original award could not have been set aside in order that new evidence might be brought before the arbitrator. He was therefore justified in refusing, at the second hearing, to act as if no award at all had been made, and in confining himself to the point specifically referred to him.

ERLE J. On a motion to refer back an award, the

Court may either refer all matters back, or limit the reference to certain matters only. In the latter case, the original award must be considered as having conclusively disposed of all matters not referred back.

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Rule discharged (a).

(a) *Crompton J. was absent.*

HOLT *against* ELY.

Monday,
April 25th.

ACTION for money had and received. Plea: *Nunquam indebitatus*. Issue thereon.

The particulars of demand stated that the action was brought "to recover the sum of 306*l.* 13*s.* 4*d.*, being the amount of a sum of money paid by the plaintiff to the defendant on" &c., "on a fraudulent misrepresentation by the defendant to the plaintiff that the defendant was the holder of an overdue acceptance for 300*l.* of one Captain *Coles* in favour of one Captain *Lane*; whereas the plaintiff was not the holder of any such acceptance, nor was there any such acceptance in existence." (Also a claim of interest.)

At the trial, before Lord *Campbell* C. J., at the *London* sittings after last *Michaelmas* term, the case for the plaintiff was that the defendant, who was a bill discounter, was, in 1851, the owner of several bills of exchange accepted by Captain *Lane*. Captain *Lane* employed plaintiff as his solicitor for the purpose of effecting an arrangement for the discharge of his debts,

L. placed in plaintiff's hand a fund, out of which plaintiff was directed to satisfy certain acceptances; defendant falsely represented to plaintiff that he held one such acceptance, and thereby induced plaintiff to pay him the amount of the alleged acceptance out of the fund. Held that plaintiff might maintain money had and received against defendant.

Semble, that *L.* might also have maintained the action.

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and placed certain funds in plaintiff's hands for that purpose. It also appeared that Captain *Lane* had drawn certain other bills upon Captain *Coles*, which the latter had accepted. Captain *Lane* was desirous of paying these last in full, and gave directions to plaintiff to that effect. The plaintiff communicated this to the defendant: and the defendant thereupon represented to plaintiff that he, defendant, held a bill for 300*l.*, accepted by Captain *Coles* for Captain *Lane*. Upon the faith of this representation, plaintiff paid 306*l.* 13*s.* 4*d.*, the amount of the alleged bill with interest, to defendant. This payment was made out of the funds placed by Captain *Lane* in plaintiff's hands. The following memorandum was at the same time signed by defendant and given to plaintiff.

“Memorandum. Mr. *Holt* has this day given me the sum of 306*l.* 13*s.* 4*d.*, in payment of the acceptance of Captain *Coles* in favour of Captain *Lane* for 300*l.* due 4th *February* 1852, and interest thereon to this day: and I hereby undertake to give up the said acceptance to Mr. *Holt* on demand. Dated this 13th *July* 1852. *J. Ely.* 306*l.* 13*s.* 4*d.*”

Some delay took place in giving up the acceptance; and, eventually, defendant brought the alleged acceptance of Captain *Coles* to plaintiff; which, however, upon examination, plaintiff discovered to be an acceptance by Captain *Lane* himself of a bill drawn by Captain *Coles*. The action was brought to recover the sum so paid by plaintiff to defendant. Evidence having been given in support of this case, the jury found a verdict for the plaintiff for the amount claimed. Leave was reserved to move to enter a nonsuit, on the ground that the plaintiff, being merely *Lane's* agent, could not maintain the action.

Bramwell, in last *Hilary* term, obtained a rule nisi accordingly.

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Edwin James and *C. W. Wood* now shewed cause. The plaintiff may maintain the action. He, and not his principal, *Lane*, is the party upon whom the fraud is directly effected. He is entrusted with a fund for the purpose of making certain payments, as to which he has received specific instructions. By the misrepresentations of the defendant, made to him, he is induced to make a payment out of that fund which is not authorized by those instructions, and which, but for these misrepresentations, he would not have made. With this payment he could not debit his principal; for it was made without the authority of the latter, who could disavow the payment and hold plaintiff answerable for the amount. The agent suffers directly from the fraud; and has consequently a right to bring an action in respect of it; *Oom v. Bruce* (a), cited in *Story's Commentaries on the Law of Agency*, s. 398 (p. 357. ed. 1839.). [*Wightman J.* In that case, this point was not made for the defence.] It was contended, on behalf of the defendant, that, as the plaintiff's principal, *Lane*, could have sued the defendant for the fraud in question, the plaintiff could not. But in cases like the present both principal and agent have a right to sue; *Story*, ut suprà; *Stevenson v. Mortimer* (b); where Lord *Mansfield* said: "Where a man pays money by his agent, which ought not to have been paid, either the agent, or principal, may bring an action to recover it back. The agent may, from the authority of the

(a) 12 *East*, 225.(b) 2 *Cowp.* 805.

1853. principal; and the principal may, as proving it to have
been paid by his agent."

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Bramwell and *Wordsworth*, contra. It is true that the payment was, according to the verdict, obtained by the defendant's fraud: but the cases cited do not go the length of shewing that the plaintiff can sue for such fraud. [Lord *Campbell* C. J. Surely Lord *Mansfield's* language in *Stevenson v. Mortimer* (a) is in point, right or wrong.] In that case the dealing was with the agent, in his own name, although in fact the agent was acting for his principal; and it was said that either agent or principal might sue. But it does not follow that, where, as in the present case, an agent, acting professedly as such, is deceived by a fraud which gives the principal a right of action in respect of it, the agent also is entitled to sue. [Lord *Campbell* C. J. The fact of the fund being general or specific may make a difference.] That is certainly a point susceptible of discussion. Where an agent has charge of a specific chattel, and this is obtained from him by fraud, there, inasmuch as no property has passed, the agent may sue, on the ground that the chattel still belongs to him, as bailee. And that might have been the case here, if the agent had been tricked out of moneys numbered in a bag, for which trover would lie. The question, who is to sue, would then be identical with the question, who lost the money: and either principal or agent might be said to have lost the chattel. But this action is for money had and received; the chattel cannot be

(a) 2 *Corp.* 805.

traced; and the claim is, not for the actual money which has been paid away, but only for an equivalent amount. That form of action is brought in respect of a contract of some kind; with whom is the contract in the present case? [*Erle J.* An action for money had and received is not necessarily founded on an actual contract; it goes almost into the regions of trover.] At all events, the plaintiff could not bring trover in the present case; because it is clear that he had sufficient discretion allowed him by his principal to admit of his making the payment in question to the defendant, although in this particular instance he may not have acted with proper caution.

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Lord CAMPBELL C. J. I am of opinion that this rule should be discharged. In the first place, it appears from the evidence that, if only one party was entitled to sue, it was the plaintiff, inasmuch as his principal, Captain *Lane*, had given him no authority to pay the amount of the bill of exchange actually satisfied, and the plaintiff was therefore guilty of negligence in making such payment, and could not debit his principal with it. Secondly, I think that either was clearly entitled to sue. In *Svensson v. Mortimer (a)*, where the action was brought by the principal in respect of an extortion committed on the agent, Lord *Mansfield* said that either principal or agent might sue. The distinguished jurist, *Story*, in his treatise on the *Law of Agency*, adopts the same view. Where a fraud has been practised upon an agent under circumstances like the present, I have no doubt that an action may be brought either by him or by his principal.

(a) 2 *Cowp.* 805.

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WIGHTMAN J. I am of the same opinion. The nature of the plaintiff's authority does not appear very clearly upon the early part of the evidence: perhaps at first he may have had some general discretion as to the form and extent of his payments: but, if so, it is clear that his general authority was subsequently qualified, and that he ought to have paid only Captain *Coles's* acceptances in full. At all events, whatever the extent of his authority, he ought not to have paid any bill of exchange at all till he had clearly ascertained by whom it was accepted. As to this fact he took the defendant's word, and so far disregarded the instructions of his principal. *Stevenson v. Mortimer (a)* is quite in point; and I think that either the plaintiff or his principal might have brought the action.

ERLE J. I am of the same opinion. The plaintiff paid this money without authority from his principal, through the misrepresentation of the defendant. I think that under these circumstances he is clearly entitled to maintain an action against the defendant for money had and received. Even if he had had authority, I think either might have sued in respect of the fraud. At all events, either might have sued had the facts been such as to have supported trover: and, where the money has been paid through the tort of the defendant, the action for money had and received has many of the incidents of an action of trover (*b*).

Rule discharged.

(a) 2 Cowp. 805.

(b) *Crompton J.* was absent.

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EVERARD and others *against* THOMAS WATSON. *Monday.*
April 25th.

THE declaration stated that *James Wright*, on 26th December 1851, made his bill of exchange, directed to *William Miles*, requiring him to pay to the order of him, *J. W.*, the sum of 50*l.*, four months after date; that *W. M.* accepted the bill, and *J. W.* then endorsed the same to defendant, who then endorsed it to *J. J. Lecke*, who then endorsed it to Messrs. *Thomas Firth and Son*, who then endorsed it to plaintiffs; and the said bill was duly presented for payment, and was dishonoured, whereof defendant had due notice, but did not pay the same. Count for interest. Plea to first count: that defendant had not due notice of the presentment and dishonour of the said bill of exchange as alleged. As to the residue of the declaration: *Nunquam indebitatus.* Issue thereon.

The following notice of dishonour of a bill held sufficient.

"We beg to acquaint you with the non-payment of *W. M.*'s acceptance to *J. W.*'s draft of 29th December last, at 4 months, 50*l.*, amounting, with expenses, to 50*l.* 5*s.* 1*d.*; which remit us in course of post without fail, or pay to Messrs. *E.*"

On the trial, before *Erle J.*, at the *Middlesex* sittings in last *Hilary* term, it appeared that the bill was duly presented for payment in *London*, by the *London* agents of *Thomas Firth and Son*, who resided at *Northwich*, *Cheshire*. The bill was dishonoured, and returned to *Thomas Firth and Son*: and they wrote to defendant as follows.

"Bank, *Northwich*, 1st May, 1852.

"Mr. *Thomas Watson*.

Sir,

We beg to acquaint you with the non-payment of *William Miles*'s acceptance to *James Wright*'s

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draft of 29th (a) *December* last, at 4 months, £50., amounting, with expenses, to £50. 5s. 1d.; which remit us in course of post without fail, or pay to Messrs. *Everards and Co., Lynn.*

Yours, &c.

Thos. Firth & Son."

A verdict was taken for the plaintiffs, for 51*l.* 15*s.*, leave being reserved to move to enter a verdict for the defendant, if the notice of dishonour contained in the letter of 1st *May* 1852 was not sufficient in law (b).

Prentice, in the same term, obtained a rule nisi accordingly.

Bramwell and *Wheeler* now shewed cause. The letter gives sufficient information of every thing that the parties to the bill ought to know. It describes the bill, states non-payment, claims 5*s.* 1*d.* as expenses, and demands payment. The claim for expenses gives information of the presentment. *Solarte v. Palmer* (c) will probably be relied on for the defendant. [Lord *Campbell* C. J. It is useless to disguise that that is a decision to be regretted.] Consistently, however, with that case, the notice here may be upheld. Since the decision, several cases have occurred going quite as far as is necessary for the present plaintiffs. They are collected in note (h) p. 216. of the 6th edition of *Byles*

(a) This error was not insisted upon in the argument.

(b) There was evidence of a further correspondence, from which it was sought to shew that the defendant had full notice: but the judgment of the Court rested on the letter of 1st *May*.

(c) 2 *Cl. & F.* 93, *Dom. Proc.*; *S. C.* 1 *New Cn.* 194; affirming the judgment of *Exch. Ch.* in *Solarte v. Palmer*, 7 *Bing* 530; *S. C.* 1 *Cr. & J.* 417.

on *Bills*. The only question which can arise here is, whether there is a notice of presentment; for it is not disputed that the other requisites of notice are satisfied. In *Bailey v. Porter* (a) it was held that sufficient notice was contained in a letter, addressed to the defendant, which stated that the "acceptance due that day was unpaid, and" whereby the writer "requested his immediate attention to it." At any rate, the notice that 5s. 1d. expenses have been incurred shews presentment. This was held enough in *Grugeon v. Smith* (b), where the letter stated that the bill "is this day returned with charges."

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Prentice, contra. In *Messenger v. Southey* (c) the notice contained the words "is not took up, and 4s. 6d. expense:" and there, though *Grugeon v. Smith* (b) and *Hedger v. Steavenson* (d) were cited, the notice was held insufficient; the Court considering that "returned with charges" pointed more directly to presentment than "not took up." Here the word is "non-payment," which goes no further than "not took up." The presentment not being expressly alleged, the question is, whether it appears by necessary implication: and, as to that, the words of Lord *Eldon*, on another point of the law, supply a safe criterion: "necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that, which is imputed," "cannot be supported;" *Wilkinson v. Adam* (e). Here it cannot be said that the strength of the probability is so great as make it impossible

(a) 14 M. & W. 44.

(b) 6 A. & E. 499.

(c) 1 M. & G. 76.

(d) 2 M. & W. 799.

(e) 1 Ves. & B. 422. 466.

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to support the notion that the writer of the notice was not pointing to the fact of presentment.

LORD CAMPBELL C. J. The law merchant requires that, to charge an indorser or drawer, there must be notice given to him that the bill has been presented and dishonoured, and that he is looked to for payment. I think such a notice as that now before us satisfies all those requisites. The indorser is made acquainted with the non-payment, and that 5s. 1d. expenses have been incurred; and he is desired to remit the money, or pay it to a party named. Is there any human being, possessed of common understanding, who will not learn from this the facts that the bill has been presented, that it has been dishonoured, and that the party addressed is looked to for payment. How could 5s. 1d. expences be incurred, except by noting, upon the bill being presented and dishonoured? Then is there any doubt that the party is held liable? He is told to remit the money. Now is not that a sufficient notice which conveys to any person of reasonable understanding the knowledge of the requisite facts? In the case of mercantile instruments it is peculiarly important that we should maintain the efficiency of words according to the ordinary usage of language. I confess my regret at the decision of *Solarte v. Palmer* (a): it has caused much confusion. It is, however, a decision which we cannot reverse; indeed I fear the House of Lords could not do so. But I do wish that it were reversed by Act of Parliament, so as to relieve the commercial world from the risk of misconceiving the law. Here, however, the words are not the same as those in *Solarte v. Palmer* (a): and, that

(a) 2 Cl. & F. 93.

being so, I am not restrained from applying to the question before me such understanding as I may possess: and it appears manifest to me that the notice conveys all the requisite information.

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ERLE J. (*a*). I think this notice is abundantly sufficient. Many cases decided since *Solarte v. Palmer* (*b*) go as far as we are going now. We cannot reverse that decision; but, subject to it, it seems to me that any words are sufficient which plainly convey the information that the bill has been presented and dishonoured, and that the party addressed is looked to for payment.

Rule discharged (*c*).

(*a*) *Wightman J.* had left the Court before the commencement of the argument.

(*b*) 2 *Cl. & F.* 93.

(*c*) *Crompton J.* was absent.

CHARLES PAUL BERKELEY *against* WILLIAM
ELDERKIN.

Tuesday,
April 26th.

COUNT: for that plaintiff, on 4th *February* 1852, in the County Court of *Northamptonshire*, holden at *Oundle*, by the judgment of the said Court recovered against defendant a certain debt of 49*l.* 8*s.* 11*d.*, as also 9*l.* 12*s.* 10*d.* for his costs and charges by him about his suit in that behalf expended, whereof defendant was convicted, as by the record thereof remaining in the said Court fully appears; which said judgment still remains in full force unreversed and unsatisfied.

Demurrer. Joinder.

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Field, for the defendant. An action will not lie on a judgment of one of the county courts created by stat. 9 & 10 *Vict. c. 95*. That Act contains special provisions as to the way in which execution shall be obtained. They are contained in sects. 92, 94, 96, 98, 99, 100 and 101. These are inconsistent with the execution which must issue if there is a judgment of the Superior Court. The case is within the principle, that, where a new right is created with special remedies, those are the only remedies. There is another objection here; the count does not shew that the cause of action was within the jurisdiction of the county court; but that should be shewn wherever the judgment pleaded is of a court of limited jurisdiction; *Read v. Pope (a)*, *Williams v. Jones (b)*.

Milward, contra. An action lay on the judgment of a county court under the old system; *Williams v. Jones (b)*. The special provisions for enforcing the judgment of the county court are cumulative. [Lord *Campbell* C. J. No: some are restrictive; under sect. 96 the wearing apparel and tools of the debtor, to the value of 5*l.*, are privileged from execution; and under sect. 99 the period of imprisonment is limited to forty days.] The power of imprisonment is not in the nature of an execution. Under the first county court Act, the amount was limited to 20*l.* (9 & 10 *Vict. c. 95. s. 58.*), for which there was no execution against the person: but the Act gave a power of imprisonment under the fraud summons (sect. 99), which, by sect. 103, is not to operate as satisfaction. And, now

(a) 1 *C. M. & R.* 302.(b) 13 *M. & W.* 628.

that the amount which may be recovered in the county court is raised, by stat. 13 & 14 *Vict. c. 61. s. 1.*, to 50*l.*, it is important that the party recovering there should have some means of getting an *elegit* so as to be able to take the debtor's lands. [*Crompton J.* There is no doubt that the case is within the general principle that the judgment of a court of competent jurisdiction creates a duty to pay, on which debt will lie: and the question is, whether there are prohibitory words, or words from which we can see the intention of the Legislature sufficiently to enable us to say that the remedy by action on the judgment is taken away.] The sections referred to do not shew such an intention. They all apply to judgments obtained in the courts abolished by stat. 9 & 10 *Vict. c. 95.*, as well as to those obtained in the county courts. It would be very strong to say that by implication the vested right of action on judgments obtained before stat. 9 & 10 *Vict. c. 95.* was taken away.

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Field was not called on to reply.

Lord CAMPBELL C. J. I am clearly of opinion that an action cannot be maintained on the judgment of a county court. *Primâ facie*, an action lies on the judgment of every court of competent jurisdiction: but I think it quite clear, when we look at the provisions of stat. 9 & 10 *Vict. c. 95.*, that the intention of the Legislature was to confine the remedy on the judgments of courts constituted under that Act to the remedies specifically provided in the Act. The policy of the Act was to give an easy and cheap remedy for the recovery of small debts. The intention of the Legislature will

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be entirely defeated if the creditor is at liberty to adopt this course. The Act provides special remedies for enforcing the judgment, both as against the property and as against the person of the debtor. As to his property, that is in part protected from execution; for sect. 96 excepts "the wearing apparel and bedding of such person or his family, and the tools and implements of his trade to the value of 5*l*., which shall to that extent be protected from such seizure." That protection would be entirely lost if this action were maintainable; for on the judgment in the superior court a *fi. fa.* may issue, under which the tools of the trade of the debtor must be taken and sold by the sheriff; and so the debtor would be deprived of the means of earning his bread reserved to him by the county court Act. Again, as to the debtor's person. He can be imprisoned, under the Act, only for forty days; and then it is not by way of execution, but as a punishment for contempt. But, if this action lies, he may be taken in execution, exactly as if the creditor had sued in the superior Court in the first instance, without availing himself previously of the facilities given by the county court. I think this brings the case within the principle, that, where new rights are given with specific remedies, the remedy is confined to those specifically given. But, further, an action can be maintained on a final judgment only, not on an interlocutory one. Now sect. 100 enacts "that it shall be lawful for the judge of any court before whom such summons shall be heard, if he shall think fit, whether or not he shall make any order for the committal of the defendant, to rescind or alter any order that shall have been previously made against any defendant so summoned before him for the payment, by instalments or

otherwise, of any debt or damages recovered, and to make any further or other order, either for the payment of the whole of such debt or damages and costs forthwith, or by any instalments, or in any other manner as such judge may think reasonable and just." This shews that there is nothing in the nature of a final judgment in the county court. The judge has still jurisdiction over this very judgment on which the action is brought. He might now rescind or alter it, and make a new order to pay by instalments or at another time. That power given to the judge would be defeated, if the action lay. These considerations are sufficient to shew that the Legislature did not intend this action to be maintained. I rejoice that we are able to come to this conclusion by the established rules of law; for there can be no doubt that it is most desirable that such actions should not lie.

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WIGHTMAN J. I agree that the action does not lie. For, if an action in a superior Court lay on the judgment of the county court, the provisions of the Legislature as to execution would be defeated; and there would also be this strange inconsistency, that the judge of the county court could alter the judgment of that court whilst an action was still pending on it in the superior Court. That would be so absurd that the Legislature must be understood to prohibit the action.

ERLE J. It seems to me that a judgment in the county court is placed on a different principle from an ordinary judgment. The new remedies given by the statute must be pursued; and they would be defeated if this action lay.

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CROMPTON J. I have no doubt that the Legislature did not intend that such a course as this should be adopted; as by this course the remedies given by the Act would be defeated: but the question is, whether that intention is expressed in the Act. Section 100, if it be taken as generally applicable to all orders, is certainly quite inconsistent with the removal of the action into a superior Court. My only doubt upon that section has been, whether it might not be confined to orders made upon fraud summonses.

Judgment for the defendant.

Wednesday,
April 27th.

The QUEEN against BINNEY, D.C.L.

By a local and personal Act (6 G. 4. c. lxxii.) Commissioners were empowered to levy rates for the improvement of the town of N., payment of which might

THE following two orders (by a rule obtained before Erle J., in the Bail Court, in *Michaelmas* term 1853) were brought up by certiorari.

“Be it remembered that, at the General Quarter Sessions of the Peace of our Sovereign” &c., “holden in and for the said Borough” (of *Newbury, Berks*), “at

be enforced by distress under the warrant of a justice. The Commissioners might sue and be sued by their clerk. Appeal to Sessions was given against any rate or order made under the Act; and the Sessions had power to give costs to either party. No order, rate or judgment was to be quashed for want of form or removed by certiorari.

A justice made an order upon *B.* for payment of a rate which had been laid; and *B.* appealed to Sessions: the Sessions, by a judgment given after stat. 12 & 13 *Vict. c. 45.*, dismissed the appeal and directed the appellant to pay costs to the clerk of the Commissioners.

Semble, per *Crompton J.*, that this was right, and that it was not necessary that the order should be to pay the costs to the clerk of the Court, under stat. 11 & 12 *Vict. c. 43. s. 27.*, 12 & 13 *Vict. c. 45. s. 5.*

But held that, supposing the order erroneous in this respect, it was a mere defect in form, and there was no want of jurisdiction so as to bring the case out of the operation of the clause taking away the certiorari.

the Town Hall thereof, on *Wednesday* the 14th day of *April*, in the year of our Lord 1852, before *Henry Selfe* *Selfe* Esq., Recorder of the said Borough, *Joseph Vines*, Clerk of the Peace, then and there attending.”

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v.
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“Reverend *Hibbert Binney*, Appellant,
and

Robert Fuller Graham, Clerk to the *Newbury*
Improvement Commissioners, Respondent.

“Against a rate made by the said Commissioners,
the 4th *November* 1851.

“On hearing the appellant in person, and Mr. *Cripps*,
of counsel for the respondents: It is ordered that this
appeal be dismissed: the question of costs being re-
served.”

“The Reverend *Hibbert Binney*, Appellant,
and

William Dredge, *John Alexander*, *Edward*
William Gray and *John Kimber*, Esquires,
Justices of the borough of *Newbury*, and
Robert Fuller Graham, Gentleman, clerk
to the Commissioners for the improvement
of the said borough, . . Respondents.

“Against a demand of certain sums rated upon him,
under a pretended assessment, purporting to have been
made on the 4th day of *November* last, by three of the
said Commissioners, and demanded on the 9th *February*
last, and subsequently attempted to be enforced by a
summons to appear before said Justices, and against the
order or decision of the said Justices requiring him to
pay part of the same in seven days under pain of
distress.

“On hearing the appellant in person, and Mr. *Cripps*,
of counsel for the respondents: It is ordered that this

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appeal be dismissed, and that the sum of 20*l.*, as costs, be paid by the appellant to the respondent *Robert Fuller Graham*."

In last *Hilary* term, a rule was obtained, on the motion of Dr. *Binney*, calling on the prosecutors to shew cause why all and singular orders made by the Recorder &c., at the Quarter Sessions holden 14th *April* 1852, "upon the several appeals of the Reverend *Hibbert Binney*, touching a rate made by the Commissioners for the improvement of the town of *Newbury*, on the 4th day of *November* 1851, whereby the said appeals were dismissed, and the sum of 20*l.*, as costs, ordered to be paid by the appellant to the respondent *R. F. Graham*, the clerk of the said Commissioners, should not be quashed, and why the said sum of 20*l.* should not be returned to the Rev. *H. Binney*."

From the affidavits, it appeared that the Commissioners for carrying into execution stat. 6 *G. 4. c. lxxii.* (a),

(a) Local and personal, public: "For lighting, watching, paving, cleansing and improving the streets, highways and places within the borough, town and parish of *Newbury*, and the tithing or hamlet of *Speenhamland*, in the parish of *Speen*, in the county of *Berks*."

Sect. 1, and sections following, provide for the appointment, qualification, swearing &c. of "Commissioners for putting and carrying the several powers and purposes of this Act into execution."

Sect. 26 authorizes the Commissioners to make rates on tenants and occupiers of houses, &c., the moneys to be paid to the collector or collectors, or other person or persons appointed by the Commissioners.

Sect. 28 enacts that, if any tenant or occupier shall neglect or refuse to pay his proportion of the rates to the said collector or collectors, or other person or persons, for the space of seven days after demand, the same shall be levied by distress and sale of his, her or their goods and chattels, by warrant under the hands and seals of one or more justice or justices, &c., the defaulter having been previously summoned.

Sect. 113 enacts: "That if any person or persons shall think himself, herself, or themselves aggrieved by any rate or assessment which shall be made or demanded in pursuance of this Act," "or by any other thing done

on 4th *November* 1851, made a rate under the provisions of the Act, whereby Dr. *Binney* was assessed in the sum of 4*l.* 17*s.* On 5th *March* 1852, Dr. *Binney* appeared

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in pursuance of this Act" (except where the order &c. is declared to be final, or where any particular method of relief is appointed in the Act), such person may appeal to the next General Quarter Sessions, first giving fourteen days notice to the person or persons appealed against, or to the clerk to the Commissioners, in case such appeal shall be made against any rate or assessment &c. made by the Commissioners, and entering into a recognizance conditioned to try the appeal, "and abide the order of and to pay such costs as shall be awarded by the justices at such sessions or adjournment thereof; and the justices at such sessions, upon due proof of such notice having been given, and of such recognizance having been entered into as aforesaid, shall hear and finally determine every such appeal in a summary way, and award such costs to the party appealing or appealed against as the said justices shall think proper:" "and the determination of the said justices, in their said general quarter sessions or adjournment thereof, shall be final, binding, and conclusive to all intents and purposes whatsoever."

Sect. 116 enacts: "That the said Commissioners respectively may sue and be sued in the name of their clerk for the time being, and all actions and suits which may be necessary or expedient to be brought for the recovery of any penalty or sum or sums of money due or payable by virtue of this Act, or for or in respect of any other matter or thing relating to this Act, may be brought in the name of the said clerk."

Sect. 122 enacts: "That no order, rate, or assessment, judgment, or other proceeding made touching or concerning any of the matters aforesaid, or touching or concerning the conviction of any offender or offenders against this Act, shall be quashed or vacated for want of form only, or be removed or removeable by writ of certiorari, or any other writ or process whatsoever, into any of His Majesty's Courts of record at Westminster, any law, statute, or usage to the contrary thereof in any wise notwithstanding."

A provisional order was made by the General Board of Health, under The Public Health Act, 1848 (stat. 11 & 12 *Vict.* c. 63.), s. 10., ordering that, after confirmation of the order by Parliament, the borough of *Newbury* should constitute a district within the Act, and that the whole of the Act, except sect. 50, should apply throughout the borough: that the Corporation should, by their council, be constituted the Local Board of Health, which Board should, after such confirmation, be the Commissioners for executing within the borough so much of the local Act as should not be repealed:

1853. on summons before certain justices of the borough of
Newbury, to shew cause why he refused to pay 2*l.* 5*s.* 6*d.*,
 The QUEEN a part of the said assessment: when the justices ordered
 v. that he should pay the same in seven days, and that, in
 BINNEY. default of his so doing, a warrant of distress should issue.
 The two appeals were, respectively, against the rate and
 the order of justices.

The affidavits on which the rule was obtained contained statements impugning the conduct of the Recorder when the appeals were brought before him; which statements were denied or explained by the affidavits in answer. The affidavits also raised some points upon the merits, which became immaterial. It appeared that the Recorder refused to hear the appeal against the rate, on the ground that it was brought too late; and that he heard the appeal against the order for payment.

Willes, for the Local Board of Health, and *R. B. Miller*, for *Graham*, now shewed cause. Sect. 122 of stat. 6 *G.* 4. c. lxxii. enacts that no proceeding shall be quashed for form, and takes away the certiorari: this rule therefore can be made absolute only upon its being shewn that there was want of jurisdiction. Now the appeal against the rate is simply dismissed; and no order for costs is made in that case: therefore, if there be no jurisdiction, nothing wrong has been done. The suggestion is that the case was not heard: and in fact it is shewn that the Recorder did not hear the case, but dis-

and that all the effects of the Commissioners should, after such confirmation, be vested in the Local Board. This provisional order was confirmed by sect. 1, and the Schedule of The Public Health Supplemental Act, 1852, (No. 2.) (stat. 15 & 16 *Vict.* c. 69.), which received the Royal Assent on 30th June 1852.

missed it for want of jurisdiction. There is therefore nothing to quash in this order. As to the appeal against the order to pay, that was heard; and costs were given against the appellant. Nothing is suggested shewing want of jurisdiction. It is understood that the appellant will suggest that the order of Sessions directs the costs to be paid to the clerk to the Commissioners, the person appealed against, under stat. 6 *G.* 4. c. lxxii. s. 113., whereas it ought to have directed the costs to be paid to the clerk of the Court, under stats. 11 & 12 *Vict.* c. 43. s. 27., 12 & 13 *Vict.* c. 45. s. 5. [*Wightman J.* Does that apply to the dismissal of an appeal? *Erle J.* I thought that, in point of form, where an appeal against an order is heard, the judgment for the respondent should be "order confirmed;" but that it should be "appeal dismissed," when the appeal is not heard.] That must be a mere question of form; if an order is not quashed, of course it stands. The language of sect. 27 of stat. 11 & 12 *Vict.* c. 43. is "decided in favour of the respondents," which shews nothing as to the form. It is at least questionable whether stat. 11 & 12 *Vict.* c. 43. overrides the local Act in respect of the party to whom the costs are to be paid: if it does, still sect. 122 of the local Act applies: the question is merely one of form. [*Lord Campbell C. J.* It seems to me exactly the sort of objection which it was intended to obviate by sect. 122. *Crompton J.* Moreover, I have very great doubts whether the order is not strictly proper.]

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Dr. Binney, in person, *contra*. The language of stat. 11 & 12 *Vict.* c. 43. s. 27. is imperative, "shall direct such costs to be paid to the clerk of the peace of such

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Court." If, however, the Court consider that this point does not affect the jurisdiction, but raises only a question as to the form of the order, and if sect. 122 of the local Act precludes all exceptions not going to the jurisdiction, the argument can certainly not be maintained. [*Erle J.* When I granted the certiorari, I understood that the costs had been given in the case which was not heard.]

Per CURIAM (a).

Rule discharged.

(a) Lord Campbell C. J., *Wightman*, *Erle* and *Crompton Js.*

Wednesday,
April 27th.

The QUEEN against The Inhabitants of ST. MARY,
WARWICK.

A building was let at 30*l.* per annum to C., by a written agreement, stating that C. had taken it "from the 30th day of September 1850;" "the tenancy is for one year, commencing on the 30th day of September instant" (1850). C. entered at noon on 30th September, 1850, and quitted at 4 in the afternoon of 29th September 1851.

ON appeal against an order of justices, whereby *Louisa Collins* and her five children were removed from the parish of *St. Mary, Warwick*, in the borough of *Warwick*, to the parish of *Leamington Priors, Warwickshire*, the Sessions quashed the order, subject to the opinion of this Court on a case which, so far as regarded the points decided, was as follows.

The respondents relied upon a settlement gained by *George Collins*, the husband of the pauper *Louisa Collins*, by renting and occupying a tenement in the parish of *Leamington Priors*; and that settlement was traversed by the grounds of appeal. In support of their case, the respondents proved that *George Collins* entered upon

Held, that C. gained a settlement by renting and occupying a tenement "for the term of one whole year at least," within stat. 1 W. 4. c. 18. s. 1.

the occupation of the *Newbold Inn*, at *Leamington*, at 12 o'clock on *Monday*, 30th *September* 1850. At 7 P.M. on the same day the following memorandum of agreement was signed.

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"Memorandum. The following are the terms on which *George Collins*, of *Leamington*, coach-proprietor, has taken, from the 30th day of *September* 1850, the messuage and premises called the *Newbold Inn*, in *Newbold Street*, *Leamington Prior's*, from *William Griffin*, of *Warwick*, as agent and solicitor of *George Farr Esquire*, the mortgagee in possession of the said premises.

"First: The tenancy is for one year, commencing on the 30th day of *September* instant.

"Second: The rent is 30*l.* per annum, payable quarterly, clear of all deductions; the first payment to be made on the 26th day of *December* next; the second and future payments payable on each succeeding quarter."

. The whole of the agreement was set out in the case: but it contained nothing material to the question, except as above. It was signed by *W. Griffin*, and *G. Collins*, and was dated 30th *September* 1850.

Mr. *Genders*, the former tenant, proved that his term expired on the previous day, namely the 29th *September*, in that year; and that he had taken and commenced the occupation of another house in *Leamington*, several days before. And that *George Collins* went with him to Mr. *Griffin*, the agent of the landlord, on the same 29th *September*, being *Sunday*, for the purpose of taking the *Newbold Inn*; but that Mr. *Griffin* refused to transact business with them on that day, as it was *Sunday*; and no agreement was then made between the parties. *Genders* continued to oc-

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cupy the public house at *Leamington* until 12 o'clock on the following day ; up to which time he supplied the customers on his own account, and received the money. On the same day, *September 30th*, about 12 o'clock at noon, Mr *Griffin* came to the *Newbold Inn* ; and *George Collins* then took complete possession of the premises, and began immediately to carry on the business of a publican therein. He and his family continued to occupy and reside in that house, without intermission, until the 29th *September*, 1851 ; on which day *Wells*, the incoming tenant, entered into possession, as hereinafter mentioned. Previously to that day *Collins* had taken a house for himself and family in the respondent parish ; and more than a month previously had entered into the following agreement with a person named *John Wells*.

“ *Leamington*, 23d *August*, 1851.

“ An agreement between *George Collins* and *John Wells*. I, *George Collins*, of the *Newbold Inn*, *Leamington*, agree to give up the aforesaid inn on the 29th *September* 1851, with the whole of the brewing plant, bar, fixtures in the bar, and the hall gas fittings, &c.

“ P. S. If either goes from this agreement, to forfeit 10*l*.

“ Signed this 23d day of *August*, 1851. Witness the + mark of *George Collins* and *John Wells*.”

Wells afterwards applied to the landlord to accept him as tenant of the *Newbold Inn* : and the landlord agreed to do so, and sanctioned his taking possession under the terms of the last mentioned agreement. On the 26th *September*, some portion of the furniture and effects of *Collins* were sold by auction at the *Newbold Inn* : and on the 29th a valuation was made of the fixtures and fittings between *Collins* and *Wells*. In the course of

that 29th *September*, *Wells* came in. He first came to the house about 10 o'clock in the morning of the 29th; but, in consequence of the absence of one *Trepess*, who was to make the valuation and was to have been in attendance at 10 o'clock, *Collins* continued to occupy the premises, and to carry on his trade there until about 4 o'clock in the afternoon; when *Wells* paid to him the money due upon a valuation of the fixtures. Immediately after that payment, Mrs. *Collins* and her family left; and *Collins* surrendered complete possession of the premises to *Wells*, who then began to carry on the trade there on his own account, his furniture having been already removed there. *Collins* left the house altogether on the following morning, having paid *Wells* six pence for his bed on the night of the 29th.

It was proved that *Collins* had paid the landlord, in respect of his occupation of the *Newbold Inn*, the entire rent agreed upon for one whole year: but it was contended by the appellants, upon the facts above stated, that he had not actually occupied for one whole year at the least within the meaning of the stat. 1 *W. 4. c. 18. s. 1*. On behalf of the respondents, it was contended that there was sufficient proof of occupation: that he was entitled to occupy, and in fact had occupied, for a year within the meaning and intention of the statute. That, at all events, it was proved that *Collins* had actually occupied the premises in question during a considerable part both of the first and of the last day of the year, as well as during all the intervening period; and that the law in such case would not take notice of the fractional part of a day, during which, by arrangement between incoming and outgoing tenant, for mutual convenience, the occupation might be changed.

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The Recorder decided that, under the above circumstances, the period of occupation by *Collins* was short of a year, and was consequently insufficient to confer a settlement upon him: and upon that ground he quashed the order of removal, subject to the opinion of this Court upon the propriety of that decision.

A further question was raised by the appellants as to the sufficiency of the evidence given by the respondents to prove the payment of poor rates by *Collins*.

It was proved by the respondents that *Collins* had been assessed in respect of the *Newbold Inn* to all the poor rates of the parish of *Leamington Priors* made during the year of his occupation; and that he had paid the same rates to one *James Manning*, since dead, who was a clerk in the service of *Richard Croydon*, the collector of rates duly appointed for the parish of *Leamington Priors*. *Richard Croydon* was called as a witness: and he stated that the deceased, *James Manning*, was his clerk, and employed by him in the collection of the rates: and that the receipts for rates produced were signed by *Manning*; and that *Manning*, so far as the witness knew, had paid over to him (*Croydon*) whatever money he had received. The receipts in question had been given by *Manning* to the pauper *Louisa Collins*, on the payment of the rates, and were produced by her on the trial of the appeal. Notice had been given to the appellants to produce the rate receipt check books for 1850 and 1851, belonging to the parish; but the appellants refused to produce them. The receipts were in the following form.

“ No. 1905.

Parish of *Leamington Priors*.

Received, the 11th day of *August* 1851, of Mr. *G. Collins*, in respect of the poor rate for the above

parish, made the 26th day of *March* 1851, on £34 assessment, at seven pence halfpenny in the pound, £1. 1. 3.

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J. Manning,
for *R. Croydon,*
Collector.

Arrears:

“Total £1: 1: 3.”

These receipts were tendered in evidence on behalf of the respondents: but the counsel for the appellants objected that they were inadmissible, on the ground that *Manning's* signature would not bind the parish. The Recorder, however, received them in evidence.

At the close of the respondent's case, the counsel for the appellants again objected that proof of payment of the rates to *Manning* was insufficient to bind the parish of *Leamington*: and that, consequently, the requirement of stat. 4 & 5 *W.* 4. c. 76. s. 66. was not complied with, and no settlement gained. The Recorder overruled the objection, subject to the opinion of this Court.

The questions for the opinion of this Court are:

1. Whether the Recorder was right in holding that the occupation of *Collins* was insufficient to confer a settlement.
2. Whether the payment of the poor rates by *Collins* to *Manning* was a sufficient payment to satisfy stat. 4 & 5 *W.* 4. c. 76. s. 66.

If the Court should be of opinion that the decision of the Recorder was erroneous as to the sufficiency of the occupation and right as to the payment of rates, then the order of sessions is to be quashed, and the original order of removal confirmed. But, if the Court should be of opinion, either that the decision of the Recorder was right as to the sufficiency of the occupation, or that

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it was wrong as to the payment of rates, then the order of sessions is to be confirmed.

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Flood and *A. R. Adams*, in support of the order of Sessions. First: there was not a year's occupation, so as to satisfy stat. 1 *W.* 4. c. 18. s. 1. The words there are "actually occupied" "for the term of one whole year at the least." The words "at the least" were used for the purpose of precluding doubt: and a strict interpretation has been put upon this Act; *Rex v. St. Nicholas, Rochester* (a), *Rex v. Berkswell* (b), *Rex v. Banbury* (c). Here *Collins* commenced occupation at noon on 30th *September* 1850, and ceased to occupy at 4 in the afternoon of 29th *September* 1851; there has therefore been an occupation for only 363 days, and two portions of days, one portion before and the other after the 363 days. Numerous authorities on the computation of time are collected in *Woolrych's Treatise of Legal Time* (d): the leading case is *Pugh v. Duke of Leeds* (e), in which it was held that, in transactions between parties, ambiguous expressions as to time shall be so interpreted as best to effectuate the intention of the parties. Here, however, it is not incumbent on the appellants to define what a year is: probably the safest definition would be that it is 365 or 366 complete days, according as the year is intercalary or not (g). [Lord Campbell C. J. Is it to be a solar year?] A calendar year is meant, which must exceed or fall short of a solar year. But it is enough for the appellants that

(a) 5 *B. & Ad.* 219.(b) 6 *A. & E.* 282.(c) 1 *A. & E.* 136.

(d) See sects. iv. v. p. 117., ad finem.

(e) 2 *Cowp.* 714.(g) See stat. 21 *H.* 3; *Woolrych*, p. 37.

a year cannot consist of less than 365 days. [Erle J. *Bracton*, fol. 359 *b* (lib. v. c. 13. s. 2.), says: "Annorum alius solaris alius lunaris, alius artificialis, alius naturalis, alius usualis." "Usualis annus qui dicitur annus minor, stat ex trecentis sexaginta et quinque diebus." In *Rex v. Swoyer* (a) the year in a corporation charter was interpreted to mean a mayoralty, though less than a year. Lord Campbell C. J. When is a man of age?] It has been said that this is at the commencement of the day preceding the twenty first anniversary of his birthday (b). But the question here turns on the particular words of the statute: there is no general rule; *Lester v. Garland* (c). [Lord Campbell C. J. There may be much nicety in applying the words "until," "from," and so on: but, here, what difficulty is there in saying that a fraction of a day shall be considered as a whole day?] In a case where an Act of Parliament required that "seven days' notice at least" should be given of an appeal to sessions, *Wightman J.* held that a notice given on 31st *December* for the sessions commencing on 7th *January* was too late, the words "at least" excluding both the day of service and the day on which the sessions commenced; *Regina v. Justices of Middlesex* (d). In *Blunt v. Heslop* (e) it was held that, in construing stat. 2 *G. 2. c. 23. s. 23.*, which directs that no attorney shall commence an action for fees "until the expiration of one month or more after" he has delivered his bill, the month is to be reckoned exclusively both of the day of delivering the bill and the day of bringing the action. [*Wightman J.* Would a demise from the

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(a) 10 *B. & C.* 486.(b) See *Anonymous case*, 1 *Salk.* 44.(c) 15 *Ves.* 243.(d) 3 *Dow. & L.* 109.(e) 8 *A. & E.* 577.

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noon of the 30th *September* to the noon of the 29th *September* following be a demise for a year?] It would not, at any rate under stat. 1 *W.* 4. c. 18. Otherwise, 365 legal years would elapse in the course of 364 actual years. Did both *Genders* and *Collins*, in construction of law, occupy for the whole of 30th *September* 1850? The holding of *Genders* did not terminate nor that of *Collins* commence till the one gave up to the other with the landlord's consent; *Rex v. Stow Bardolph* (a). [Erle J. In *Rex v. Skiplam* (b) it was held that a hiring on the day after *Martinmas* till *Martinmas* was a hiring for a year; and Buller J. said that, if the service "only include part of the day, as there is no fraction of a day, the service would be complete." Lord Campbell C. J. The settlement requires a renting for a year (c) and payment of 10*l.* of that rent: when would a demise for a year, made on 30th *September*, expire?] At the end of 29th *September* following; *Higham v. Cole* (d): but the occupation must be for the same year as the hiring; *Rex v. Banbury* (e). The tenancy here, according to the habendum, is to commence on 30th *September* 1850: but, as the first quarter's rent is reserved payable on 26th *December* 1851, and the next payments are to be on each succeeding quarter (not three months), the term cannot commence on 30th *September*; for that will be the day of payment of the last quarter's rent: now, if it were included in the first quarter, it would be excluded from the last; so that the first quarter would consist of a day more than a quarter, and the last rent would be

(a) 1 *B. & Ad.* 219.

(b) 1 *T. R.* 490.

(c) *Stat.* 6 *G.* 4. c. 57. s. 2.

(d) 20 *Vin. Abr.* 266. *Time* (A), pl. 1.

(e) 1 *A. & E.* 136.

payable after the term was expired: effect was given to this consideration in *Ackland v. Lutley* (a). The redendum must controul the habendum. [*Wightman* J. How do you reconcile that with the case of a forehand rent?] That may be reserved: but a rent payable after the expiration of a term is unintelligible. Lord *Denman* C. J., in *Ackland v. Lutley* (a), says that the whole anniversary of the day from which a term is granted is included in the term: on any construction of this demise there was no occupation by the lessee for the whole of such anniversary. In some instances, the computation begins the instant an act is done from which the time is to be reckoned, as in the case of a life insurance; *Anonymous* (b) case in Lord *Raymond*. The rent here was at any rate not due till the end of 29th *September* 1851, supposing that to be the last day of the term; *Duppa v. Mayo* (c). [Lord *Campbell* C. J. In some sense that is so: but it may be demanded at sunset.]

Then as to the receipts signed by the deceased clerk of the collector. [Lord *Campbell* C. J. Have you any chance of success on that point? I was counsel in a case of *Doe dem. Patteshall v. Turford* (d), which seems to be conclusive against you.] The question is, whether this be not a delegation of a delegation: the collector must have been appointed by order of the Poor Law Commissioners. [*Wightman* J. Is not this evidence, especially when coupled with that of *Croydon*, from which a jury might infer a receipt by *Croydon* himself?] If the Court take a decided view on this point, it will not be pressed. [The Court intimated that they had no doubt.]

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(a) 9 A. & E. 879. 894.

(b) 1 Ld. Raym. 480.

(c) 1 Saund. 282.

(d) 3 B. & Ad. 890.

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Isaac Spooner, contra. The question is now confined to the first point. It was said in *Dyer* (a) that a quarter of a year consists of 91 days, half a year of 182, but the year of 365 days, and that to the six hours over the law pays no regard. Where an indenture of lease, habendum "for three years from henceforth," was "delivered at four o'clock in the afternoon of the said 20th day of June, it was resolved, that this lease should end the 19th day of June in the third year, for the law in this computation doth reject all fractions and divisions of a day for the uncertainty, which is always the mother of confusion and contention"; *Clayton's Case* (b): and the same principle is laid down in *Henning v. Brabason* (c). *Lester v. Garland* (d) is an authority for the respondents; though it is true that each case must be governed by its own particular circumstances. As far as any general rule can be collected, it seems to be this: that portions of a day will be reckoned as whole days unless where injustice will result from doing so. The cases of hiring and service are also in favour of the respondents: one of them has been mentioned from the Bench: they are collected in 1 *Nol. P. L.* 358 (4th ed.). It is said, on the other side, that the words of stat. 1 *W.* 4. c. 18. are peculiarly stringent: but those of the Hiring and Service Act, 8 & 9 *W.* 3. c. 30. s. 4., are equally so: "shall continue and abide in the same service during the space of one whole year." Statutes establishing a settlement are construed liberally in favour of the settlement; *Rex v. Fifehead Magdalen* (e), *Rex v. Ellisfield* (g); in both of which cases the Court refused to make

(a) 3 *Dyer*, 345. a. pl. (5).(c) *Bridgm.* 1.8.(e) *Burr.* S. C. 116.(b) 5 *Rep.* 1 a.(d) 15 *Ves.* 248.(g) *Cald.* 1.

a fraction of a day. (He was then stopped by the Court.)

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LORD CAMPBELL C. J. I am glad that we have decided cases, on an Act of Parliament similar to that before us, in favour of the only view which is consistent with common sense. Any one, talking of these facts in ordinary language, would say that the pauper occupied for a year. I would abstain from so holding, if any recognised rule or direct decision militated against it: but really law and sense concur. The general rule is that the law does not regard fractions of a day. Well then, here is an occupation which begins on the 30th of *September* and continues through a part of the 29th of *September* following: there are therefore 365 days of occupation, which make a legal year. Then is the case within any of the exceptions in which it has been held that the fraction of a day may be regarded? I think not. You must indeed regard the fraction in cases where you have to determine the rights of contending parties, each insisting on their portion of the time: but this is not such a case. Then we have an Act of Parliament in *pari materia*, and in words almost identical. I know no practical difference between the words of stat. 8 & 9 *W. 3. c. 30. s. 4.*, "shall continue and abide in the same service during the space of one whole year," and those of stat. 1 *W. 4. c. 18. s. 1.*, "actually occupied" "for the term of one whole year at the least." Now under stat. 8 & 9 *W. 3. c. 30. s. 4.* it has been often held, and very properly, that a hiring on one day to the day next before the anniversary of that day, and a service for that time, are a hiring and a service for a

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year, although, during a fraction of the first and last days, there is no actual service. Apply that to the renting and occupying of a tenement. Here, by the very form of the instrument, the hiring is for one year commencing on 30th *September*. Was there then an occupation for that year. The occupation began on the 30th of *September* and ended on the 29th of *September*; so that, including those two days, there were 365 days, making up a whole year. It seems to me, therefore, that there was a renting for a year and an occupation for that year; and that a settlement was acquired.

WIGHTMAN J. I am of the same opinion. There is nothing to take this case out of the general rule, unless the words "one whole year at the least," in stat. 1 *W. 4. c. 18. s. 1.*, have that effect. But that phrase does not mean more than the phrase "one whole year," which we find in stat. 8 & 9 *W. 3. c. 30. s. 4.*; and, as to the last mentioned statute, it has been expressly decided that a fraction of a day is not to be regarded in computing the year of hiring and service. Really the language of the two statutes is practically identical; and the construction of the one determines that of the other.

ERLE J. I also am clearly of the same opinion. The rule, that the law does not regard fractions of a day, is applicable to this case. *Collins* occupied for 365 days, two of the days being only portions of days; the common rule therefore applies. The cases of hiring and service are precisely in point; the statutes are in *pari materiâ*; and the same principle is applicable to each.

CROMPTON J. The only question is whether the portion of a day is, for the purposes of this computation, to be reckoned a whole day. It appears that this is the rule in cases of hiring and service, and in reckoning the period of a demise. That being so, the present case is clear.

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Order of Sessions quashed.

The QUEEN *against* DENDY and another.

Wednesday,
April 27th.

MANDAMUS to *Arthur Hyde Dendy*, Esq., lord of the manor of *Charlton* in *Middlesex*, and *Samuel Frederick Dendy*, gentleman, his steward of the same manor. The writ suggested that the manor is, and from time whereof &c. hath been, an ancient manor, within which said manor there are, and during all the time aforesaid have been, divers copyhold estates and hereditaments, descendible, and which have descended, from ancestors to heirs, as of the hereditary right of the tenants of the said manor, respectively, held of the lord of the said manor for the time being, by the rod and by copy of Court roll, at the will of the lord according to the custom of the said manor, and by certain rents, heriots,

Mandamus to lord and steward of a manor. The writ suggested that the manor contained copyholds descendible to heirs as of the hereditary right; that *T.*, the maternal uncle of *P.*, was admitted to a copyhold to hold to him and his heirs, according to the custom, and died seised thereof and intestate; that the copyhold descended to

P., as heiress, at law and according to the custom, of *T.*; and that *P.*, having become entitled to an estate of inheritance therein from *T.*'s death, had demanded admittance, which was refused; and the writ commanded the defendants to admit.

Return: that the copyhold did not descend to *P.*, as heiress, at law and according to the custom, of *T.*; that *P.* is a stranger in blood to *T.*; and is not and never was entitled to the estates and hereditaments.

Pleas: 1. That the copyhold did descend to *P.*, as heiress, at law and according to the custom, of *T.*; 2. That *P.* was not nor is a stranger in blood to *T.*; 3. That *P.* was, on the death of *T.*, entitled to the estates and hereditaments: all concluding to the country.

On demurrer to the 2nd plea, held: That the plea was bad; for that it must be taken by itself, and, so taken, was no answer to the return, inasmuch as, if it were found for the prosecutrix, it would not support a peremptory mandamus.

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suits, services and customs, therefore due and of right accustomed; and which said copyhold estates and hereditaments, from time to time, during all the time aforesaid, have respectively been conveyed from one person to another upon the surrender of the respective tenants thereof: and the lord of the said manor for the time being, during all the time aforesaid, hath admitted, and of right ought to have admitted, and still &c., all and every person or persons who shall have become duly entitled to such copyhold estates and hereditaments within the said manor, to be the tenants thereof, according to the custom of the said manor, upon payment of such fines, and performing such duties and services, as are payable and due in respect of such respective admissions. That, at a Court holden for the said manor, on 5th *February*, 1839, one *Samuel Tull*, Esquire, the maternal uncle of one *Elizabeth Halford Payne*, was admitted tenant to all that plot or parcel of copyhold ground, situate in *Charlton Field* within the said manor, containing &c. (describing the said land and other premises), to hold the same, with the appurtenances, unto the said *Samuel Tull*, his heirs and assigns, for ever, at the will of the lord according to the custom of the manor. That the said *Samuel Tull* departed this life on or about 10th *July*, 1851, seised of the said copyhold estates and hereditaments, and intestate as to the same, and without leaving any issue. And that thereupon the said copyhold estates and hereditaments descended and came to the said *Elizabeth Halford Payne*, as the heiress at law, and heiress according to the custom of the said manor, of the said *Samuel Tull*: and that she, having become entitled to an estate of inheritance of and in such last mentioned estates and hereditaments from and imme-

diately after the death of the said *S. Tull*, did, on or about 1st *October* 1851, tender and offer to pay to *A. H. Dendy* such sums as he would, as Lord, be entitled to on her admission, and to perform all duties, customs, &c., according to the custom, and required *A. H. Dendy* to admit her tenant; but he, and *S. F. Dendy* as steward, with due notice of the premises, had refused and still did refuse to admit. The writ then commanded *A. H. Dendy* and *S. F. Dendy*, as lord and steward respectively, to call a court of the manor, if necessary, and admit *E. H. Payne*, on payment of the usual fines and fees, or shew cause &c.

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Return. That, though &c. (admitting the preliminary statement as to the manor, copyhold estates and customs), and though *S. Tull* departed this life on or about 10th *July* 1851, seised of the said copyhold estates and hereditaments, yet that the said copyhold estates and hereditaments, whereof *S. Tull* died so seised, did not, upon the death of *S. Tull*, descend or come to the said *E. H. Payne*, as the heiress at law, and heiress according to the custom of the said manor, of the said *S. Tull*: and that the said *E. H. Payne* is a stranger in blood to the said *S. Tull*: and is not, and never was, entitled to the said estates and hereditaments whereof *S. Tull* died so seised, or any of them, or any estate therein.

Elizabeth Halford Payne came before the Court, and, after protesting that the return was not sufficient in law, pleaded: "That the said copyhold estates and hereditaments, whereof the said *Samuel Tull* died so seised as in the said writ mentioned, did and each and every of them did, upon the death of the said *S. Tull*, descend and come to the said *E. H. Payne* as the heiress at law, and heiress according to the custom of the said manor,

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of the said *S. Tull*; as in the said writ is alleged. And this &c. (conclusion to the country).

And, for a further plea, the said *E. H. Payne* says that she was not, nor is, a stranger in blood to the said *S. Tull*, as in the said return to the writ is alleged: and this &c. (conclusion to the country).

And, for a further plea, the said *E. H. Payne* says that she was, on the death of the said *S. Tull*, entitled to the said estates and hereditaments, whereof the said *S. Tull* died so seised, and to each and every of them, as in the said writ is alleged: and this &c. (conclusion to the country).

The defendants joined issue on the first and third pleas, and demurred to the second, assigning for causes of demurrer the points insisted on in argument. Joinder in demurrer.

T. Jones, for the defendants. The plea demurred to raises too large an issue. The question between the parties is, whether *E. H. Payne* is in any way the heiress of *S. Tull*: if she is not, she must fail; if she is, she is entitled to a peremptory mandamus. The suggestion in the mandamus certainly is that *S. Tull* is the maternal uncle of *E. H. Payne*: but that is not a material suggestion, and could not be traversed: neither is the allegation in the return that *E. H. Payne* is a stranger in blood to *S. Tull* the material part of the return.

Ogle, contra. The defendants having put on the record an allegation that *E. H. Payne* is a stranger in blood to *S. Tull*, the prosecutrix could not safely leave this untraversed: that would have been tantamount to an admission that she was not heiress at law; and thus the prosecutrix, though she succeeded on the other issues,

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would not have been entitled to judgment. In *Cowlishaw v. Cheslyn* (a), where a defendant in trespass justified under a right of way alleged to have been granted by C. who was seised in fee of the locus in quo, and the plaintiff traversed only the grant, it was held that C.'s seisin in fee was admitted on the record. [Crompton J. The seisure of C. was there a necessary step in the deduction of the right: if the rest of the plea had been true, but C. had not been seised in fee, the defendant must have failed. In *Cooke v. Blake* (b) *Cowlishaw v. Cheslyn* (a) was, after consideration, supported, on the ground that the seisin was there material and traversable. Here, as soon as it is shewn that E. H. Payne is heiress at law to S. Tull, the case for the prosecution is established: what more would be decided by the issue on this plea?] The defendants have chosen to shew in what way the prosecutrix was not heir: that entitled the prosecutrix to traverse that particular mode of denying the heirship; *Goram v. Sweeting* (c), where *Tatem v. Perient* (d) and *Sir Francis Leke's Case* (e) are cited; notes (21) and (22) to *Gorham v. Sweeting* (c). It does not lie in the mouth of the defendants to say that their own defence is immaterial; *Reynolds v. Blackburn* (g). How could it be safely left untraversed? [Crompton J. You admit nothing by not traversing that which, as being immaterial, is not traversable; *Bennion v. Davison* (h).] "A

(a) 1 Cr. & J. 48.

(b) 1 Exch. 220.

(c) 2 Wms. Saund. 205, 206. See *Lush v. Russell*, 5 Exch. 203.

(d) Felv. 195.

(e) 3 Dyer, 365 a. See *Hammond v. Colls*, 1 Com. B. 916.

(g) 7 A. & E. 161.

(h) 3 M. & W. 179. See *Grew v. Hill*, 3 Exch. 801.

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party may, in general, traverse a material allegation of title or estate, to the extent to which it is alleged, though it need not have been alleged to that extent;—and such traverse will not be considered as too large;” *Stephen on Pleading*, 282 (5th ed.).

T. Jones, in reply. The argument on the other side, if correct, would shew that the prosecutrix can compel the defendants to prove more than is necessary for their defence. A plea is bad which will not decide the case, whichever way the issue upon it is found (*a*). What will be decided if the jury find that the prosecutrix was not a stranger in blood? It is admitted, so far as this plea is concerned, that the land did not descend to the prosecutrix as heiress. *Smith v. Lovell* (*b*) illustrates the argument that the traverse is here too large.

Lord CAMPBELL C. J. As I have been unavoidably absent during a part of the argument, I do not propose to pronounce any opinion.

ERLE J. (*c*). The plea evades the material part of the return, which is the denial that the land descended to *E. H. Payne* as heiress of *S. Tull*. And, besides, the return states that she is not and never was entitled to the estates. I think the substance of the return is that she was not heiress. The first plea does allege that the land did descend to her as heiress: and it might perhaps be justifiable also to traverse the allegation that she was not entitled: but to plead, besides, that she was not a stranger in blood, is to put an immaterial

(*a*) See *Burroughs v. Hodgson*, 9 *A. & E.* 499; *Parker v. Gill*, note (*a*) to *Walker v. Clements*, 15 *Q. B.* 1047.

(*b*) 10 *Com. B.* 6.

(*c*) *Wightman J.* had left the Court.

traverse on the record. The demurrer therefore is right; and the defendants must have judgment.

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CROMPTON J. I am of the same opinion. We are to consider the plea, which is demurred to, by itself. The real question is, whether *E. H. Payne* is heiress to *S. Tull*. The assertion that she is not a stranger in blood leaves that undetermined. What judgment could we give for the prosecutrix if she succeeded on this point? We can direct a peremptory mandamus only on the ground that she is heiress: a peremptory mandamus upon a finding on this issue could not be supported. But then it is urged that to leave the allegation in the return untraversed would be to admit that she was a stranger in blood. That is not so: in fact the argument amounts to saying that the allegation can be traversed because it is traversable; for, unless it be material, it cannot be traversed, and is not admitted by being left untraversed. It is also argued that, where too special an allegation is put on the record, that may be traversed in terms. That is not true as to any idle stuff which may be pleaded. It is quite true that, if you assert a material fact to exist in one particular mode only, that particular mode may be traversed: for instance, if an estate is pleaded only as an estate in fee and nothing is proved but an estate for life, the plea fails: but that is because a necessary fact is alleged in one way only; and, unless it exists in that way, it is not shewn to exist at all. But that principle is quite inapplicable here, where the return denies that the land descended to the prosecutrix as heiress.

Lord CAMPBELL C. J. added that, so far as he could

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thereof, and for the best price &c., and did and should convey the same to the purchaser or purchasers thereof, or as he, she or they should direct or appoint. And the said testator, *W. Row*, did thereby authorize and empower, order and direct, his said executors, and the survivors or survivor of them, and the executors and administrators of such survivor, in like manner to make sale and dispose of all and every his copyhold messuages, lands, tenements, hereditaments and premises, situate and being in &c., in the said county, and to convey the same, with their appurtenances, by bargain and sale to the purchaser or purchasers thereof, or as he she or they should direct or appoint (receipts of the executors to be discharges; and other provisions not material to the present case). And the testator, *W. Row*, thereby further declared that, if his son *George Row* should be desirous of purchasing all or any part of his said freehold and copyhold messuages, lands, tenements and hereditaments, by valuation to be made in the usual and customary way, it should be lawful for him so to do, notwithstanding his being thereby appointed one of the executors of the said will: that his said executors, the said *B. Gall* and *G. Gall*, and the survivor of them, his executors &c., were thereby fully authorized and empowered, ordered and directed, to convey, release, bargain and sell, or otherwise assure, all and every such part or parts of his said freehold and copyhold messuages, lands, tenements and hereditaments to his said son *G. Row*, his heirs or assigns, or as he or they should direct or appoint. That the said *W. Row* died seised of the said copyhold hereditaments and premises, on 3d April 1845, without having altered or revoked his said will, so far as it relates to the said copyhold here-

ditaments and premises. That, upon the death of *W. Row*, his said son, the said *G. Row* in the said will named, was, at a court holden for the said manor of *Thorpe Hall* on the 16th *April* 1846, duly admitted, according to the custom &c., to the said copyhold hereditaments and premises of which *W. Row* died seised as aforesaid, to hold the same to the said *G. Row*, for the intents and purposes declared thereof by the said will of the said *W. Row*, and with, under and subject to the powers, provisions, directions and declarations in the said will contained, of and concerning the same, according to the custom and at the will of the lord of the manor; and *G. Row*, at the time, or soon after his said admittance, paid to *George Moor*, being the steward of the manor, and acting as such for and on behalf of *T. G. Corbett*, the lord of the manor, the sum of 90*l.*, as a full fine, that is to say a fine to the same amount as if the said *G. Row* had been admitted to an estate in fee simple to the said copyhold hereditaments and premises; and also the further sum of 8*l.* 8*s.*, for the steward's fees, costs and charges upon such admission. That *Benjamin Gall*, *George Gall* and *George Row*, in pursuance of the authority, power and direction in the said will of *W. Row* in that behalf contained, did, on 25th *April* 1851, cause certain parts of the copyhold hereditaments and premises, parcel of the said manor, of which *W. Row* died so seised, and to which the said *G. Row* was so admitted as aforesaid, that is to say, a messuage &c., to be put up to sale by public auction, but no adequate or sufficient sum was bid or offered for the said part of the said copyhold messuages, hereditaments and premises, and the same were therefore bought in. That *G. Row*, being desirous to

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become the purchaser of the said part of the said copyhold hereditaments and premises, so put up to sale as aforesaid, and to hold the same to his own use, and the said *B. Gall* and *G. Gall* being willing to sell to the said *G. Row* the same part of the said copyhold hereditaments and premises, did, in accordance with the provisions and powers in the will, cause the same to be valued at the sum of 320*l.*; and *George Row* agreed with *B. Gall* and *G. Gall* to purchase, who agreed with the said *G. Row* to sell to him, the said part of the said copyhold hereditaments and premises which had been so put up to sale as aforesaid, at that sum. And thereupon, by indenture bearing date 10th *April* 1852, and made between *B. Gall* and *G. Gall* of the one part, and *G. Row* of the other part, they, the said *B. Gall* and *G. Gall*, in pursuance of the said agreement, and for effectuating the said sale, and in consideration of the said sum of 320*l.* to them paid by *G. Row*, pursuant to, and by force and virtue and in exercise and execution of the power or authority given or reserved to or vested in them in and by the will, and of every other power and authority in anywise enabling them in that behalf, did bargain and sell, remise, release and for ever quit claim unto *G. Row*, his heirs and assigns, the said part of the said copyhold hereditaments and premises which had been so put up to sale as aforesaid, to have and to hold the same, with the appurtenances, unto and to the use of *G. Row*, his heirs and assigns, for ever, at the will of the lord of the manor, by copy of court roll, according to the custom of the manor, and by and under the rents, suits and services therefore due and of right accustomed, freed and discharged of and from the trusts of the said will: which deed of bargain and sale

was afterwards duly tendered to, and accepted and received by, *George Moor*, being the steward of the manor, for enrolment, and was afterwards duly enrolled by *G. Moor*, being such steward, according to the custom &c. That *G. Row*, being afterwards desirous, for certain considerations in that behalf, of surrendering out of Court the said part of the said copyhold hereditaments and premises in the said indenture of bargain and sale mentioned, and thereby bargained &c. unto *G. Row*, out of his, the said *G. Row*'s, hands into the hands of the lord of the said manor, by the hands and acceptance of *G. Moor*, the said steward, by the rod, and according to the custom &c., to the only use and behoof of *B. Gall* and *G. Gall*, their heirs and assigns for ever, subject to a certain proviso, and upon condition nevertheless that, if *G. Row*, his heirs, executors, administrators and assigns, should pay to *B. Gall* and *G. Gall*, their executors, administrators or assigns, the sum of 270*l.*, with interest, at certain times, such surrender should be void; and *G. Row* being also desirous of having such surrender enrolled by *G. Moor*, as such steward, according to the custom &c.; he, the said *G. Row*, on the 24th *April* now last past, and again on the 4th day of *May* now last past, did cause application to be made on his behalf to *G. Moor*, so being such steward &c., to take and accept from *G. Row*, out of Court, according to the custom &c., and to enrol according to the custom &c., a surrender of the said part of the said copyhold hereditaments and premises in the said deed of bargain and sale mentioned, and thereby bargained &c. unto *George R.*, in the words and upon the terms and conditions following.

“The manor of *Thorpe Hall*. Be it remembered that

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1853. on the day of A. D. 1852, *George Row*,
 The QUEEN of" &c., "a copyhold tenant of the said manor, came
 v. before me, *George Moor*, gentleman, steward of the said
 CORBET. manor and of the courts thereof, and did, in consideration
 of the sum of 270*l.* of lawful" &c., "to him in hand well
 and truly paid by *Benjamin Gall*, of" &c., "and *George
 Gall*, of" &c., "at or immediately before the passing of
 this surrender, the receipt whereof" &c. (acknowledg-
 ment by *G. Row*), "out of court surrender out of his
 hands into the hands of the lord of the said manor, by
 the hands and acceptance of me the said steward, by the
 rod, according to the custom of the said manor, all that
 messuage" &c. ("to which said hereditaments and pre-
 mises the said *George Row* was duly admitted tenant,
 for the intents and purposes declared thereof by the will
 of *William Row*, late of" &c., "deceased, out of court,
 before the steward, on the 16th day of *April* 1846; and
 which said hereditaments and premises have, by an
 indenture bearing date the 10th day of *April* last, been
 duly bargained and sold by the said *Benjamin Gall* and
George Gall, in exercise and execution of the power or
 authority to them reserved or given in and by the said
 will of the said *William Row*, deceased, to the said
George Row, his heirs and assigns for ever, freed and
 discharged from the trusts of the said will), and the re-
 version and reversions, remainder and remainders, yearly
 and other rents, issues and profits thereof, and all the
 estate, right, title, interest, use, inheritance, property,
 possession, benefit, claim and demand whatsoever, both
 at law and in equity, or otherwise howsoever, of him
 the said *George Row*, of, in, to or out of the said here-
 ditaments and premises, and every part and parcel
 thereof, to the only use and behoof of the said *Benjamin*

Gall and *George Gall*, their heirs and assigns, for ever: provided always, and upon condition nevertheless, that, if the said *George Row*, his heirs, executors, administrators or assigns, do and shall well and truly pay" &c. (proviso for avoiding the surrender, on payment of 270*l.*, with interest). "Taken, the day and year first above written, by me, the said steward. Received, before the passing of this surrender," (receipt of the 270*l.* from *B. G.* and *G. G.*, by *G. R.*).

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That *G. Moor*, being steward, had refused to accept and receive the surrender. The writ then commanded *T. G. Corbett* and *G. Moor*, or one of them, to "accept and receive from the said *G. Row*, out of Court, and to enrol according to the custom" &c., "a surrender of the said part of the copyhold hereditaments and premises mentioned in the said deed of bargain and sale, and thereby bargained" &c. unto "the said *G. Row*, subject to the proviso and upon the condition before mentioned:" or to shew cause &c.

Return. "That, according to the custom of the said manor of *Thorpe Hall*, whenever a power is given, by the last will and testament of any copyhold or customary tenant of the said manor, to his executor or executors, or to any other person or persons in such will in that behalf named, to sell and convey all, or any part, of any lands or hereditaments, copyhold of the said manor, of which he or she may happen to die seised, to any purchaser or purchasers thereof, then, and in such case, it is usual and customary for the lord or lady of the said manor for the time being, and according to the custom thereof (after the death of such testator, and after a presentment has been duly made by the homage of the

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said manor at a customary court duly holden in and for the said manor of such the death of such testator as aforesaid, and after a proclamation for the next customary heir or heirs of such testator, or for any other person or persons claiming or seeking to be admitted to such lands or hereditaments, copyhold of the said manor, to come in and claim the same, and to be admitted thereto, has been duly and according to the custom of the said manor made at such last mentioned customary court, and also at each of the two next succeeding customary courts duly holden in and for the said manor), to enter into such lands or hereditaments, copyhold of the said manor, and to seise the same, and the rents and profits thereof, into his or her own hands, until such next customary heir or heirs of such testator, or some other person or persons claiming or seeking to be admitted to such lands or hereditaments, copyhold of the said manor, shall claim to be admitted thereto, unless such next customary heir or heirs of such testator, or some other person or persons, claiming or seeking to be admitted to such lands or hereditaments, copyhold of the said manor, should, after the death of such testator, and either before such third proclamation as aforesaid, or at and during the customary Court in which such third proclamation should so happen to be made as aforesaid, claim to be admitted as tenant or tenants to the lord or lady of the said manor, of and in such lands or hereditaments, copyhold of the said manor, and according to the custom thereof. And further that, whenever any such power as aforesaid is so given by any such last will and testament of any such copyhold or customary tenant of the said manor as aforesaid, and such next customary heir or heirs of such testator as

aforesaid, or such other person or persons so claiming or seeking to be admitted to such lands or hereditaments, copyhold of the said manor as aforesaid, should, after the death of such testator as aforesaid, and either before or after such due presentment of his or her death as aforesaid, and before any execution of such power by such executor or executors, or such other person or persons, so in such will in that behalf named as aforesaid, claim to be admitted as tenant or tenants to the lord or lady for the time being of the said manor, of and in such lands or hereditaments, copyhold of the said manor, and according to the custom thereof, then, and in such case, it is usual and customary in the said manor for the lord or lady thereof, for the time being, to admit such next customary heir or heirs of such testator as aforesaid, or some or one of them, or such other person or persons, or some or one of them, so claiming or seeking to be admitted as last aforesaid, as tenant or tenants to the lord or lady of the said manor for the time being of and in such lands or hereditaments, copyhold of the said manor, and according to the custom thereof, to hold the same for the intents and purposes declared thereof by such will, and with, under and subject to the powers, provisoes, directions and declarations in such will contained of and concerning the same. And, further, that, upon and after such admission as last aforesaid, it is usual and customary in the said manor for the lord or lady thereof for the time being, and such lord or lady thereof is thereupon and thereafter fully entitled, according to the custom of the said manor, to demand and have, of and from such next customary heir or heirs of such testator as aforesaid, or of and from such other person or persons so admitted

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as last aforesaid, a full fine, according to the custom of the said manor, that is to say, a fine to the same amount as if such next customary heir or heirs of such testator, or such other person or persons so admitted as last aforesaid, had been so admitted to an estate in fee simple of and in such lands or hereditaments, copyhold of the said manor. And, further, that, upon and after such admission as last aforesaid, it is also usual and customary in the said manor for the steward thereof, for the time being, and such steward is fully entitled, according to the custom of the said manor, to demand and have, of and from such next customary heir or heirs of such testator as aforesaid, or of and from such other person or persons so admitted as last aforesaid, the same steward's fees, costs and charges as he, the said steward, would have been entitled to if such next customary heir or heirs of such testator as aforesaid, or such other person or persons so admitted as last aforesaid, had been admitted to an estate in fee simple of and in such lands and hereditaments, copyhold of the said manor. And, further, that, whenever, after such executor or executors, or such other person or persons so in such will in that behalf named as aforesaid, in exercise and execution of such power so entrusted to him, her or them, by and under such will as aforesaid, and according to the custom of the said manor, shall have duly appointed such lands or hereditaments, copyhold of the said manor, or any part thereof, either by any deed of bargain and sale, or otherwise, according to the custom of the said manor, to any purchaser or purchasers thereof, and such purchaser or purchasers thereof shall have duly tendered such deed of bargain and sale, or other customary conveyance, to the steward,

for the time being, of the said manor, for enrolment, and the same shall have been accordingly duly entered upon the court rolls of the said manor by such steward, and according to the custom of the said manor, then, and in such case, and according to the custom of the said manor, such purchaser or purchasers is, or are, upon such enrolment as last aforesaid, thereby become fully entitled to be admitted tenant or tenants to such lord or lady of the said manor, for the time being, of and in such lands or hereditaments, copyhold of the said manor, and according to the custom thereof, whether, before such enrolment of such deed of bargain and sale, or other customary conveyance, as aforesaid, any such customary heir or heirs of such testator as aforesaid, or any such other person or persons as last aforesaid, shall or shall not have been admitted to such lands or hereditaments, copyhold of the said manor, before and in default of any execution of such power as aforesaid. And, further, that, according to the custom of the said manor, all lands or hereditaments, copyhold of the said manor, are holden of the lord or lady of the said manor, by the respective tenants thereof, and according to the custom thereof, by and under the gavelkind tenure."

That, at the time of the death of *W. Row*, he, *W. Row*, left three sons lawfully begotten, him surviving, and no more; that is to say, one *William Row*, and the said *G. Row* in the writ named, and *Frederick Row*: which said three sons, at the time of the death of such testator as aforesaid, were and still are, according to the custom of the said manor, and according to the customary tenure of gavelkind aforesaid, the next customary heirs of the said testator, the said *W. Row*, of and in

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the said lands and hereditaments, copyhold of the said manor, of which the testator *W. Row* so died seised, as in the writ mentioned. That, at the time of the admission of *G. Row*, as in the writ mentioned, no sale had theretofore been effected in pursuance and execution of the said powers in the said will of the testator *W. Row* contained, of all or any portion of the said hereditaments and premises, copyhold of the manor, of which *W. Row* so died seised as in the writ mentioned. That *G. Row*, at the time such his said admittance, so paid to *G. Moor*, then being steward of the manor, the said sum of 90*l*., as a full fine, and the said further sum of 8*l*. 8*s*., for the fees costs and charges of *G. Moor* as in the writ mentioned, according to the said custom of the said manor in that behalf hereinbefore mentioned. That, since the execution of the said power in the said will of *W. Row* contained, as in the writ mentioned, and since the date of the said deed of bargain and sale to the said *G. Row* in the writ also mentioned, *G. Row* has not, at any time, either in person or by attorney or otherwise, claimed to be admitted tenant to *G. Corbett*, the lord of the manor, of and in the said copyhold hereditaments and premises so appointed, and so bargained and sold to him by *B. Gall* and *G. Gall* as in the writ mentioned; nor has *G. Row*, at any time since the execution of the power in the said will of *W. Row* contained, as in the writ mentioned, or since the date of the said deed of bargain and sale, or at any other time whatsoever, paid, or offered or tendered to pay, to *G. Corbett*, lord of the manor, or to any one else whomsoever, for and on his behalf or otherwise, any sum or sums of money whatsoever, as and by way of a fine, or otherwise, for and in respect of the estate and interest which, under and by

virtue of the said power, and of the said deed of bargain and sale, in the writ respectively mentioned, was and is so purported to be transferred and conveyed to *G. Row*, as in the writ in that behalf mentioned. Wherefore, and for the causes aforesaid, defendants refused to accept the surrender.

General demurrer. Joinder.

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H. Mills, for the prosecutor. *George Row*, having been admitted tenant, and having paid the full fine which is payable in respect of an admittance to an estate in fee simple, is entitled to make the surrender without further admittance. [Lord Campbell C. J. The amount of the fine cannot affect the character of the admittance.] It does not. But, the admittance being complete, what more can be done? He is tenant already. [*Erle J.* He is entitled to a third only: how happens he to be admitted as if he were entitled to the whole?] The custom, as set out in the return and admitted by the demurrer, is that, where there has been such a devise as this, any one may be admitted upon the devisor's death, though without title. [*Erle J.* He is admitted only subject to the power of sale; it is an interim admittance. Suppose the power executed in favour of a third person, must not the appointee be admitted before he can mortgage?] The argument on the other side is, that the admittance of *George Row*, which has already taken place, has no more effect, as far as the present question is concerned, than that of any stranger would have. [Lord Campbell C. J. It is a singular custom, to take notice of a power reserved in a will and admit any person quousque.] The effect seems to be to make the person admitted a trustee for the purposes of the will.

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The admittance here is “for the intents and purposes declared” by the will, “and with, under and subject to the powers, provisoes, directions and declarations in the said will contained.” He is not, it is true, admitted to an estate of inheritance. [*Erle J.* It is not even an admittance to a complete life estate: it is an admittance to hold till the power is executed.] If the power had been executed in favour of a third party, such third party must have been admitted before he could surrender: till such admission, *George Row* would have been tenant. [*Lord Campbell C. J.* I do not think he would. His estate would have been defeated upon the execution of the power; and there would have been a vacancy upon the roll. *Erle J.* It seems to me that would be so, just as if *George Row* had died, having been admitted to a life estate.] The lord, in such a case, could not act as upon a vacancy on the roll until the death was presented and proclamation made. He cannot, in contravention of his own act, dispute the fact that *George Row* is his tenant. Nor can he be injured by accepting the surrender, as he has had the full fine. [*Lord Campbell C. J.* Is the surrender itself valid under such circumstances? If not, can the lord be required to accept it?] It does not appear that the custom allows of any larger admittance than to an estate for life. [*Crompton J.* You seem to be demanding that you shall be in the same position as you would have been placed in by a new admittance to an estate in fee simple.] No admittance, in effect, is for longer than life: the admittance in fee merely shews who is entitled to be admitted on the termination of the life. The prosecutor here takes no new estate either by the devise or the bargain and sale. The attempt is to obtain a fine in consequence of the intervention of a

transaction with a third party: but the lord has no right to notice that. In *Rex v. The Lord of the Manor of Hendon* (a) a copyholder covenanted to surrender to *G.*, and *G.* assigned his interest to *R.*, who claimed admittance: the covenant was presented by the homage: but the Court held that *R.* was entitled to be admitted upon payment of a single fine, as if *G.*'s interest had not intervened. [Lord Campbell C. J. By inheritance, you have a third only of the estate: you claim to exercise a dominion over the whole.] Whatever interest the other two heirs in gavelkind had by the admittance of the prosecutor (b) is determined by the execution of the power, as much as if the two had released to the prosecutor. The bargain and sale may also be considered as a release by the executors to the tenant for life. [Crompton J. The sound view seems to be that, after the execution of the power, the appointee is in the same position as if he had been the original devisee.] That is so: but the devisee requires admittance: here the appointee is already tenant. The habendum is regulated by the custom. The mandamus merely requires the lord to accept and enrol the surrender according to the custom. The precise terms of the surrender set out in the writ are not insisted on.

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Rouse, contra. The custom to admit any nominee, without reference to his interest, has been introduced for the sake of convenience: the execution of the power is frequently impossible until after the time for three courts, or a longer time, has expired: under the custom,

(a) 2 T. R. 484.
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(b) See 1 *Scris. Cop.* 296 (4th ed.).
3 K E. & B.

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a good life may be selected, to hold quousque. The prosecutor ought not to complain of the fees incident to this practice as a hardship: had the devisees been admitted, in respect of their interest, all must have been admitted. [Lord *Campbell* C. J. Still it seems a strange custom, to admit one who has no legal estate.] The object is, to avoid the necessity of admitting the heir as tenant until the power is executed. But the prosecutor now attempts to treat his admittance as making him tenant in fee simple. It is contended that his admittance is good for all purposes: but in terms no more than a life estate is given, and that is made defeasible upon the execution of the power. The tenancy under the admittance is therefore at an end as soon as the power is executed (a). Again, he at any rate can claim only one third: an admittance of a single coparcener is not an admittance of all, though the three may be admitted by a single admittance. Further, the prosecutor takes a new estate by the execution of the power; and he ought to be admitted in respect of this; *Sheppard v. Woodford* (b). If there be no new estate, the prosecutor is still tenant only to the extent of one third, and has a defeasible estate; so that he is not entitled to surrender. The surrender mentions the bargain and sale. No stress can be laid on the fact that the fine paid is the full fine for an estate in fee simple. [Lord *Campbell* C. J. We have intimated our opinion that this is of no importance.] The bargain and sale cannot operate as a release by the executors: they have no reversion, but only a power: besides, a release of a copyhold acts by

(a) See *Res v. The Lord of the Manor of Oundle*, 1 A. & E. 283.

(b) 5 M. & W. 608.

way, not of enlarging the estate, but of extinguishment (a).

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H. Mills, in reply. The prosecutor being tenant, no matter for what interest, was capable of taking a release of all the rights of the executors. [Lord *Campbell* C. J. 'The executors have no right to the land.] It is as if the devisee had released. [Crompton J. There is no enlargement of the prosecutor's estate: it is a new estate.] The bargain and sale may operate by way of renunciation of a claim. [Lord *Campbell* C. J. No doubt a disseisor, being in, may take a release: but that must be a release by a party having a right to the land. The executors have only a naked power. The appointee takes under the creator of the power.] The admittance is not limited to any particular right: the lord may admit conflicting parties in order to enable them to try their rights.

LORD CAMPBELL C. J. The question is, whether the lord was bound in this case to accept the surrender. We are to look to the situation of the surrenderor. If he, having been admitted, was tenant on the roll at the time, he was entitled to make the surrender, and the lord was bound to accept it: but, if he was not the tenant on the roll, there was no such right or liability. There is in this manor a peculiar custom: namely, that a tenant may be admitted quousque, till a power of appointment given by will be exercised, and that the

(a) See 6 *Vin. Abr.* 75. tit. *Copyhold* (Z. a) pl. 7 and note; citing *Coke's Complete Copyholder*, s. 36. (p. 83, ed. 1764.).

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ERLE J. (a). The surrender is tendered on the part of the bargainee under the power of appointment: the question is whether the bargainee, having been in fact once admitted and having paid a fine, is entitled to exercise the rights of a tenant without a second admittance and fine. The custom appears to be, that, upon such a will as this, some person, whom the executors name, is admitted, and pays a full fine: and that, upon execution of the power, the appointee is admitted, also upon payment of a fine. Here the person who has been finally appointed was the person admitted in the first instance: and he claims to be entitled to surrender, in the character of appointee. But his tenancy under the original admittance has ceased, as much as if that had been the admittance of a stranger. It is therefore the same case as if any third person, upon being appointed, had claimed to surrender without being admitted. He must pay the fine again. The prosecutor therefore has failed to make out a case.

(a) *Wightman J.* had left the Court.

CROMPTON J. It seems that, in order to avoid a seizure quousque, a nominee is admitted to hold until the tenant really entitled, whether as heir or appointee, comes in. Such a nominee is tenant only till the power is executed. When it is executed, his admittance is gone: and the appointee under the power, whether he be identical with the former tenant or not, must be admitted, after the appointment, before he can surrender.

LORD CAMPBELL C. J. The prosecutor would be in the same situation if he were not one of three customary heirs in gavelkind.

Judgment for the defendants.

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The QUEEN *against* WILLIAM RAINES, Esquire.

Thursday,
April 28th.

UTDALL, in last Term, obtained a rule calling on *William Raines*, Esquire, Judge of the County Court of *Yorkshire*, holden at *Howden*, to shew cause why a mandamus should not issue commanding him to hear a plaint in replevin, entered for trial in the said Court, between *George Allen* and *Daniel Hutton*.

From the affidavits it appeared that *Hutton* distrained the goods of *Allen* as for rent; and that the question between *Hutton* and *Allen* involved the title to the premises. The Judge declined to try the cause, on the ground that he had no jurisdiction. The rule was obtained on behalf of *Allen*. No recognizances had

The county court has still cognizance of replevin though title comes in question, subject to the power of removal by either party under sect. 121 of stat. 9 & 10 Vict. c. 95.

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been given by either party under stat. 9 & 10 *Vict.*
c. 95. s. 121.

Hugh Hill now shewed cause. The Judge has no interest in the question one way or other, but wishes to have the directions of this Court. The question turns on the construction of stat. 9 & 10 *Vict.* c. 95. sects. 58, 119, 120 and 121. Sect. 58 enacts "that all pleas of personal actions, where the debt or damage claimed is not more than 20*l.*," "may be holden in the county court, without writ." "Provided always, that the court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments," "shall be in question." Had this section stood alone, the county court would clearly not have had cognizance of an action of replevin in which the title to the premises is in question. But, by sect. 119, it is "declared and enacted, that all actions of replevin in cases of distress for rent in arrear or damage *faisant* which shall be brought in the county court shall be brought without writ in a court held under this Act." Sect. 120 provides: "That in every such action of replevin the plaint shall be entered in the court holden under this Act for the district wherein the distress was taken." Sect. 121 provides: "That in case either party to any such action of replevin shall declare to the court in which such action shall be brought" (amongst other things) "that the title to any corporeal or incorporeal hereditament" "is in question," "and shall become bound, with two sufficient sureties" &c., "then, and not otherwise, the action may be removed before any court competent to try the same in

such manner as hath been accustomed." [Lord Campbell C. J. It seems to me that, taking the sections together, compliance with the condition in sect. 121 is required, before the action can be removed, although the title comes in question. *Crompton J.* The effect is to make actions in replevin commence as they did before the Act; and, if they are to be removed into a Superior Court, it must be in the manner prescribed by sect. 121.]

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Udall was not called on to argue in support of his rule.

Per CURIAM (*a*).

Rule absolute.

(*a*) Lord Campbell C. J., *Wightman*, *Erle* and *Crompton J.*s.

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The remaining Cases in this volume, upon writs of error from the Court of Queen's Bench, are reported rather before their order in date, that they may be contained in the same volume with the reports of the decisions below.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

[Friday,
April 29th.]

The YORK and NORTH MIDLAND RAILWAY COMPANY *against* The QUEEN on the prosecution of BURTON and LEAING.

An Act for making a railway recited that the formation of the railway would be beneficial to the public, and that the Company were willing to execute it: and the power of compulsorily taking lands, with the then ordinary powers, was given to the Company. A mandamus issued, commanding the Company to complete the line.

JUDGMENT was given in the Queen's Bench, for the Crown, on demurrer to the return to a mandamus commanding the defendants to complete their line: *Regina v. York and North Midland Railway Company (a)*. Upon this judgment, the defendants below brought error. Joinder in error.

The case was argued in *Hilary* Term last (*b*), by

Held by the Exchequer Chamber, reversing the decision of the Queen's Bench, that the mandamus ought not to go, no duty being cast on the Company to make the line; the words of the Act being enabling, not obligatory, and there being nothing in the subject matter or context to require that they should be construed as compulsory.

And that the case was not affected by the fact that the Company had completed a part of the line.

(a) Ante, p. 178, where the pleadings are reported.

(b) January 28th and 29th. Before Jervis C. J., Pollock C. B., Cresswell, Williams and Talfourd Js., and Parks, Alderson, Platt and Martin Bs.

Sir *Fitzroy Kelly*, for the plaintiffs in error (defendants below), and *Hugh Hill*, for the Crown. Such of the arguments as were not used in the Court below are sufficiently stated in the following judgment.

Cur. adv. vult.

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JERVIS C. J., in this term (*April 29th*), delivered judgment.

This was a writ of error from a judgment of the Court of Queen's Bench, upon a demurrer to a return to a mandamus commanding the plaintiffs in error, the defendants in the Court below, to purchase lands and make a railway from *Market Weighton* to *Cherry Burton*, pursuant to stat. 12 & 13 *Vict. c. lx.*, the *York and North Midland Railway Act* of 1849. After argument and time taken to consider in that Court, my brother *Erle* was of opinion that the plaintiffs in error were entitled to judgment; but Lord *Campbell* was of a different opinion: and, my brother *Crompton* concurring with him, the prosecutors had judgment; and a peremptory mandamus was awarded.

We have carefully considered this case; and, having examined the authorities cited, and the statutes, are of opinion that my brother *Erle* was right in the view which he took of it; that the judgment ought to have been given for the plaintiffs in error and not for the prosecutors; and that the judgment of the Court of Queen's Bench must be reversed.

The facts which raise the question may be shortly stated. In 1846 the plaintiffs in error obtained an Act empowering them to make a railway from *York*, through *Market Weighton* and *Cherry Burton*, to *Beverley*. They made a portion of this line, from *York* to *Market*

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Weighton, but did nothing upon the remainder of it.

The powers of their Act expired, as to so much of their line as lies between *Cherry Burton* and *Beverley*, before the mandamus was applied for: but in 1849 they obtained an Act, authorizing them to abandon the line between *Market Weighton* and *Cherry Burton*, and to substitute in lieu thereof the line now under discussion. There are two prosecutors; one has land on the proposed new line, and is a landowner on the line from *York* to *Market Weighton*, his land having been taken for the purposes of that railway. The other has land on the proposed line from *Market Weighton* to *Cherry Burton*; and his name is in the schedule to the Act of 1849.

Upon these facts several points arise: 1. Does the statute of 1849 cast upon the plaintiffs in error a duty to make this railway?: 2. If it does not, is there under the circumstances a contract, between the plaintiffs in error and the landowners, which can be enforced by mandamus?: 3. And, failing these propositions, does a work which in its inception is permissive only become obligatory by part performance?. These questions will be found, upon examination, to exhaust the subject, and to comprehend every view in which this mandamus can be supported. In substance, do the Acts of Parliament render the Company liable to an indictment for a misdemeanour, and to actions by the parties aggrieved, for not making the railway? For, if they do not, the mandamus will not lie: and thus the question depends entirely upon the construction of the special Acts, and of the statutes incorporated therewith.

The Act of 1849 may cast the duty upon the plaintiffs in error in one of two ways: it may do so by express

words of obligation, or it may do so by words of permission only, if the duty can be clearly collected from the general purview of the whole statute.

The words of the 3d section of the Act of 1849, "it shall be lawful" for the said Company to make the said railway, are permissive only, and not imperative: and it is a safe rule of construction to give to words used by the Legislature their natural meaning, where absurdity or injustice does not follow from such a construction. Indeed, if there were any doubt upon this subject, other parts of the statute, referred to in the argument, clearly shew that these words were intended to be permissive only. The distinction is well put by my brother *Erle* (a). "The company are permitted at their option to take lands, turn roads, alter streams, and exercise other powers, and these matters are made lawful for them; but they are commanded to make compensation for lands taken, to substitute new roads for those they turn, and to perform other conditions relating to the exercise of the powers: and these matters are required from them." It seems clear, therefore, that the duty is not cast upon the plaintiffs in error by the express words of the statute of 1849: and indeed it was not so urged in the argument, nor was it so put by Lord *Campbell*, in his judgment in the Court below.

But it does not follow, merely because the words of the 3d section are permissive only, that there is no duty cast upon the plaintiffs in error, by the statute taken altogether, to make this railway. This point was not relied upon in this case in the Court below; but it was made the distinct ground of decision in another case in

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that Court (*Regina v. Lancashire and Yorkshire Railway Company (a)*), and was much pressed in the argument before us in support of this judgment. It becomes necessary therefore to examine the statute in its general provisions, and to consider the grounds upon which the Court of Queen's Bench proceeded in the case of *Regina v. Lancashire and Yorkshire Railway Company (a)*. We agree with Lord Campbell, that the portion of the line between *Market Weighton* and *Cherry Burton*, to which the mandamus applies, is not to be considered as a separate railway or even as a separate branch of railway, but is to be treated as if in its present direction it had been included in the Act of 1846. The Acts then, taken together, in substance recite that it will be of advantage to the public if a railway is made from *York* to *Beverley*, through *Market Weighton* and *Cherry Burton*, according to certain plans and sections, deposited as required by the practice of Parliament, and referred to in the statutes; and that the plaintiffs in error are willing to make that railway. Upon this basis the whole provisions are founded. It has been proved that the work will be advantageous to the public; it is assumed that it will be profitable to the Company, and that therefore they will willingly undertake it. Accordingly, the Company are empowered to make the line: if they do make it they may take land; but if they do take land they must make compensation. If necessary, they may turn roads or divert streams: but, if they do, they must make new roads and new channels for the streams they alter. Similar provisions pervade the whole statutes; but, throughout, the command waits upon the

(a) Ante, p. 228.

authority, and the distinction between “may” and “must” is clearly defined. But, as it is manifest that such general powers must stop competition, and may to a certain extent be injurious to landowners on the line, the compulsory power to take lands is limited to three years, and the time for making the railway to five years, after which the powers granted to the Company cease, except as to so much of the line as shall then have been completed; and the land, if taken by the Company, reverts upon certain terms to the original proprietors. An argument might have been founded upon the terms in which the latter provision is contained. By the 10th section of the Act of 1849 it is enacted that the railway *shall be completed* within five years from the passing of that Act. This section was not referred to in the argument for that purpose; but it might be said that these words are compulsory and impose a duty on the Company to make the line. The context of the section, however, when examined, shews that such is not the meaning of it. If not completed within five years, the powers of the Act are to expire, except as to so much of such railways as shall then have been completed. If the section were intended to be obligatory, it would not contain this exception, which contemplates that the line may be made in part. It is inconsistent to suppose that the Legislature would say to the Company, in the same section: You may complete a part only, if you can, in five years; and therefore as to that part the powers of the Act shall continue; but you must complete the entire line in that time.

On the whole, therefore, we find no duty cast upon the Company to make this railway in any part of the Act of Parliament. On the contrary, the Legislature

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seem to contemplate the possibility of the railway being made in part, or being totally abandoned. In the latter case, the powers expire in three or five years. In the former, the statutes remain in force as to so much of the railway as shall have been completed within that time, and expire as to the residue. This provision is inconsistent with an intention to compel the Company to make the entire line, as the consideration for the powers granted by Parliament.

But it is said that a railway Act is a contract on the part of a company to make the line, and that the public are a party to that contract, and will be aggrieved if the contract may be repudiated by the company at any time before it is acted upon. Though commonly so spoken of, railway Acts, in our opinion, are not contracts, and ought not to be construed as such: they are what they profess to be, and no more; they give conditional powers, which, if acted upon, carry with them duties, but which, if not acted upon, are not, either in their nature or by express words, imperative upon the companies to whom they are granted. Courts of justice ought not to depart from the plain meaning of words used in Acts of Parliament: when they do so, they make, but do not construe, the laws: and, if it had been so intended, the statute should have required the Company to make the line in express terms: indeed some railway Acts are framed upon that principle: and to say that there is no difference between words of requirement and words of authority, when found in such Acts, is simply to affirm that the Legislature does not know the meaning of the commonest expressions. //

But, if we were at liberty to speculate upon the intentions of the Legislature where the words are

clear, and to construe an Act of Parliament by our own notions of what ought to have been enacted upon the subject, if, sitting in a Court of Justice, we could make laws, much might be said in favour of the course which in our opinion is taken by the Legislature upon such subjects. Assuming that the line, if made, would be profitable to the public, this benefit may be delayed for five years, during which time competition is suspended; on the other hand, if the line would pay, it probably will be proceeded with, unless the company having the powers is incompetent to the task. Individual landowners may be benefitted by the expenditure of capital in their neighbourhood, without looking to the ultimate result; but it is not for the public interest that the work should be undertaken by an incompetent company, nor that it should be begun, if, when made, it would not be remunerative. By leaving the exercise of the powers to the option of the company, the Legislature adopts the safest check upon abuse in either of these respects,—self interest.

It seems to us, therefore, that these statutes do not cast upon the plaintiffs in error this duty, either by express words or by implication; that we ought to adhere to the plain meaning of the words used by the Legislature, which are permissive only; and that there is no reason in policy or otherwise why we should endeavour to pervert them from their natural meaning.

But it is said that the landowners are in a better situation than the public at large, and that the privilege to take their lands is the consideration which binds the Company to complete the railway; that during the currency of the three years they are deprived of their

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full right of ownership, and, if not to be compensated by the construction of the railway, they would in many cases sustain a loss, because, whilst the compulsory powers of purchase subsist, they are prevented from alienating their lands or houses described in the book of reference, and from applying them to any purposes inconsistent with the claim which may be made to them by the railway company. In truth they are not prevented from so doing, at any time before the notice to take their lands is given, if they act *bonâ fide*, in the mean time, the notice to take their lands being the inception of the contract between the landowners and the Company. But, if this complaint were better founded, it does not follow, merely because certain landowners are subjected to a temporary inconvenience for the advancement of a public good, that therefore the Company are bound to make the whole railway. If it were a contract between the landowners and the Company, it would not be just that one should be bound and the other free: but to assert that there is a contract between the landowners and the Company is to beg the whole question; for upon this part of the case the question is whether there is such a contract. As a matter of fact, we know that in many cases no such actual contract exists. Some few proprietors may desire and promote the railway: but many others oppose it, either from a disinclination to the project, or with a view to make better terms. With the dissentients there is no contract unless it be found in the statutes: and to the statutes therefore we must refer to see what is the obligation which is cast upon the Company in respect of the landowners upon the line.

As in the former case, the words upon this subject are permissive only. The Company may take land: if they do, they must make full compensation. In this state of things, if there be a bargain between the parties, what is that bargain? The Company say, in the language of the statutes, that they shall make full compensation for the land taken and no more; the prosecutors say that the consideration to be paid for the land is the full compensation mentioned in the Act, and also the further consideration of an entire line of railway from *York* to *Beverley*. But, if this is the price which the prosecutors are to have, each landowner is entitled to the same value; and yet, by this mandamus, the other proprietors on the line from *Market Weighton* to *Cherry Burton*, who perhaps are hostile to the application, are constrained to sell their land for an inadequate consideration: viz. a full compensation, and a part only of the line of the railway, to which, by the hypothesis, they were entitled by the original bargain. If this were the true meaning of the statutes, it would indeed be unjust: more so than the imposition of those temporary inconveniences, to which it is said the landowners may be subjected, and to which we have already referred. But that it is not the true meaning is clear from the words of the statutes, which are permissive only, and impose the duty of making full compensation to each landowner as the option of taking the land of each is exercised, and, further, from the section to which we have already referred, which contemplates the total abandonment of the line or the part performance of it, and makes provision for the return of the land to the original proprietors in certain cases.

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Upon this part of the case the authority of Lord Eldon in *Blakemore v. The Glamorganshire Canal Navigation* (a) was much pressed upon the Court. Speaking of local Acts for private undertakings, he says: "When I look upon those Acts of Parliament, I regard them all in the light of contracts made by the Legislature, on behalf of every person interested in any thing to be done under them; and I have no hesitation in asserting that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than any thing in the whole system of administration under our constitution. Such Acts of Parliament have now become extremely numerous; and, from their number and operation, they so much affect individuals, that I apprehend those who come for them to Parliament, do, in effect, undertake that they shall do and submit to whatever the Legislature empowers and compels them to do; and that they shall do nothing else:—that they shall do and shall forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public, as with reference to the interests of individuals." There is nothing in this language to which it is necessary to make the least exception; indeed it is no more than an illustration of the obligatory nature of the duty imposed by Acts of Parliament which do impose a duty with reference to others. In that case, the statute had secured to Mr. *Blakemore* the surplus water, and had commanded the Company to do certain things in order that he might enjoy it. In discussing whether Mr. *Blakemore's* right under the

(a) 1 *Myl. & K.* 154. 162.

statute was affected by his right before the statute, his Lordship might well say that he considered the statute, the origin of Mr. *Blakemore's* right, in the light of a contract: and, the statute then under discussion containing express words of command, he might well add, that those who come for such Acts of Parliament do in effect undertake that they shall do and submit to whatever the Legislature empowers and compels them to do. As we understand them, the words used by Lord *Eldon* in no respect conflict with the view we take of this case. But, if they mean that words of permission only, when used in the class of statutes under consideration, should receive a construction different from their ordinary meaning, because if construed otherwise they might work injustice, with great respect for his high authority we dissent from that proposition; we agree with my brother *Alderson*, who, in *Lee v. Milner* (a), said: "These Acts of Parliament have been called parliamentary bargains made with each of the landowners. Perhaps, more correctly, they ought to be treated as conditional powers given by Parliament to take the land of the different proprietors through whose estates the works are to proceed. Each landowner, therefore, has a right to have the powers strictly and literally carried into effect as regards his own land, and has a right also to require that no variation shall be made to his prejudice in the carrying into effect the bargain between the undertakers and any one else." "This," he adds, "I conceive to be the real view taken of the law by Lord *Eldon* in the case of *Blakemore v. The Glamorganshire Canal Company*" (b).

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(a) 2 Y. & Coll. Exch. Equity, 611. 618.

(b) 1 Myl. & K. 151.

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There remains but one further view of the case to be considered; and of that we have partly disposed in the observations which we have already made. But, in as much as Lord *Campbell* proceeded upon this ground only in the Court below, although it was not much relied upon before us in argument, we have, out of respect to his high authority, most carefully examined it, and are of opinion that the mandamus cannot be supported upon the ground that the railway Company, having exercised some of their powers, and made part of their line, are bound to make the whole railway authorized by their statutes.

It is unnecessary here to determine the abstract proposition, that a work, which before it is begun is permissive, is after it is begun obligatory. We desire not to be understood as assenting to the proposition of my brother *Erle* (a), that "many cases may occur where the exercise of some of the compulsory powers may create a duty to be enforced by mandamus." And, on the other hand, we do not say that such may not be the law. If a Company, empowered by Act of Parliament to build a bridge over the *Thames*, were to build one arch only, it would be well deserving of consideration whether they ought to be indicted for a nuisance in obstructing the river, or for the non-performance of a duty for not completing the bridge. It is sufficient to say that in this case there are no circumstances to raise such a duty, if such a duty can be created by the act of the party. The plaintiffs in error have made the principal portion of their line, and they have abandoned the residue, from no corrupt motives, but because *Beverley*

(a) Ante, p. 206.

has already sufficient railway communication, and because the residue of their line passes through a country thinly populated, and, if made, would not be remunerative.

But it is said that a railway Company are not in the situation of purchasers of land with liberty to convert it to any purpose, or to allow it to lie waste ; that they are allowed to purchase it only for a railway ; and, having acquired it under the compulsory powers of the Act, there must be an obligation on the Company to apply the land to that and to no other purpose. Subject to the qualification in the Act, this is undoubtedly true. Having acquired the lands of a particular landowner, the Company could not retain them by merely laying rails upon the lands so taken ; and we agree that it never was intended that a landowner should be left with a high mound or a deep cutting running through his estate and leading neither to nor from any available terminus. The precaution against such a wasteful expenditure of capital might perhaps safely be left to the self interest of the Company : but, if such a work were to be done, it would not be a practicable railway, and after five years the powers of the Act would expire and the land revert in the original proprietor. It is true that he would sustain some inconvenience without the corresponding advantage of railway communication ; but in the meantime he would have received full compensation for the market value of the land and for all damage by severance or otherwise, and would receive back the land on more reasonable terms. To be a railway, it must have available termini. When the statutes passed, all persons supposed that the termini would be *York* and

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Beverley; and, if the argument is well founded and the Company are bound by taking land on any portion of the railway to complete the whole line, it would seem to follow that one of the prosecutors, by compelling the Company to take his land on the line from *Market Weighton* to *Cherry Burton*, would thus entitle himself to a mandamus to compel them to make the line from *Cherry Burton* to *Beverley*, and, the Act having expired, to apply to Parliament for a renewal of their powers for that purpose. But, although the termini were originally intended to be *York* and *Beverley*, it is plain the Legislature contemplated the possibility of the line being abandoned, or being only partially made, because in the one case the powers of the Act were to cease, and in the other they were partially continued. An option therefore is given to some one. By the course taken, the Court of Queen's Bench has exercised that option, and said the line shall be made, not to *Beverley*, but to *Cherry Burton*. In our opinion that option was left to the Company; and, the Company having bonâ fide made an available railway over the land taken, their obligation to the land owners has in this respect been fulfilled.

The cases upon this subject are very few: and the absence of authority is very striking, when we remember how many Acts have passed in *pari materiâ*, not only for railways but also for bridges and turnpike roads. Notwithstanding the numerous occasions in which such proceedings might have been taken, and the manifest interest of land owners to enforce their rights, no instance can be found of any indictment for disobeying such a statute, or of a mandamus for the purpose of enforcing it. If correctly reported, Lord *Mansfield* deter-

mined this point in *Rex v. The Proprietors of the Birmingham Canal* (a); for he says: "The Act imports only an *authority* to the proprietors, not a *command*: They may desert or suspend the whole work, and a fortiori any part of it." On the other side, the language of Lord Eldon in the *Bakemore v. The Glamorganshire Canal Navigation* (b) is referred to as an authority for this mandamus. In our opinion it does not bear that construction, although it appears that the Court of Queen's Bench took a different view of that authority in *Regina v. The Eastern Counties Railway Company* (c), and was inclined to act upon it and award a mandamus. The writ was subsequently withheld in that case, upon another ground; but Lord Denman seems to have been of opinion that upon a fitting occasion a mandamus ought to go. This, and the recent cases in the Queen's Bench now under discussion, are the only cases which bear upon the subject. We feel that Lord Denman and Lord Campbell are high authorities upon this or any other matter, and are both equally entitled to the respect of this Court: but we are bound to pronounce our own judgment; and, after the most careful consideration, are of opinion that judgment ought to be for the plaintiffs in error.

The result is, that the judgment of the Court below must be reversed.

Judgment reversed (d).

(a) 2 *W. Bl.* 708.

(b) 1 *Myl. & K.* 162.

(c) 10 *A. & E.* 531.

(d) In conformity with this decision, the judgment of the Court of Queen's Bench in *Regina v. Lancashire and Yorkshire Railway Company* (ante, p. 228) was reversed in the Exchequer Chamber without argument; *Lancashire and Yorkshire Railway Company v. The Queen*, May 28th, 1853.

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IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

[Saturday,
April 30th.]The GREAT WESTERN RAILWAY COMPANY *against*
The QUEEN.(On the relation of *Langford* and *Smith*.)

Mandamus to make a line to R. It appeared, on the record, that, after the making of the return but before the judgment of the Court below, the powers of the Company had expired.

The Court of Queen's Bench having held that, notwithstanding this, a peremptory mandamus should be awarded, the

propriety of the decision on this point was questioned by the Judges in the Exchequer Chamber: but the judgment was reversed on another ground: *ideo quare*.

In the special Act, it was enacted that "it should be lawful for" the Company to make a line to R., the line in question, "and, if they shall think fit," a branch. And that the line to R. "shall commence at" &c, "and shall terminate at R.," and the branch, "if the same shall be constructed, shall be made" &c. In the Act was a power to lease the branch, with the powers for making it.

Held: that it was not obligatory on the Company to make the line to R., the peculiar words of the special Act not taking the case out of the general rule.

MANDAMUS to make a railway to *Radstock*. The Court of Queen's Bench having awarded a peremptory mandamus in this case, a writ of error was brought. The record is sufficiently stated in the report of the case below (a): but the course of the argument in error makes it necessary to set out some parts of the special Act more fully than was requisite for the former report. The special Act in this case was "The Great Western Railway Amendment and Extensions Act, 1847" (10 & 11 *Vict. c. ccxxvi.*, local and personal, public). Sect. 1 recited, amongst other things, that "the making a railway" from *Twyford* to *Henley*, "and also a railway"

(a) *Regina v. Great Western Railway Company*, ante, p. 253.

from *Twiverton* to *Radstock*, "would be of great public advantage": and that "it is also expedient that certain portions of the line of *The Great Western Railway*" should be widened and enlarged. Sect. 4 enacted: "that it shall be lawful for *The Great Western Railway Company* from time to time to raise, by creating new shares or stock," 380,000*l.* Sect. 5 enacted that, after the 380,000*l.* has been subscribed for, and one half paid up, "it shall be lawful for the directors of the said *Great Western Railway Company*" to borrow or mortgage 126,656*l.* Sect. 7: "that it shall be lawful for the said *Great Western Railway Company*, if they think fit, to raise the sums authorized to be borrowed on mortgage by this Act, or any part thereof, by creating new shares of the said Company, instead of borrowing the same." Sect. 11: that "it shall be lawful for the said Company to make and maintain the said railways to *Henley* and to *Radstock* respectively, and, if they think fit, the diverging lines, or any of them, shewn in the plans, from such last mentioned branch railway to various collieries lying adjacent thereto, and also to widen and enlarge the said *Great Western Railway*." Sect. 13: "that the said intended railway first above mentioned shall commence by a junction" at *Twyford*, "and shall terminate in" *Henley*; "and the said intended railway secondly above mentioned shall commence by a junction" at *Newton*, "and shall terminate" at *Radstock*. "And the said branch railways, if the same shall be constructed, shall be made in the lines defined on the plans deposited." Sect. 30: "That it shall be lawful for the said Company" "to let on lease the said diverging lines of railway from the branch railway to *Radstock* hereby

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authorized to be made or any of them, or any part thereof, either before or after the construction of the same, with all the powers of the said Company in reference thereto, to the owners or others interested in the adjacent collieries and works to which the same respectively extend, for such term or terms of years, at such rent or rents, or subject to such agreements as to the construction thereof by the said last mentioned parties and upon such other conditions as may be mutually agreed upon between such last mentioned parties and the said Company." The line in question was the line to *Radstock*.

Butt, for the plaintiffs in error (defendants below), prayed that the judgment of the Court of Queen's Bench might be reversed, and contended that the case did not differ in principle from *York and North Midland Railway Company v. The Queen (a)*.

Welsby, contra. The language of the special Act in this case is peculiar: and it may therefore be contended, without impeaching the judgment of this Court in *York and North Midland Railway Company v. The Queen (a)*, that the Act is obligatory on the Company. The recital makes a distinction between the two lines and the alterations to be made in the line of *The Great Western Railway*. The making of the lines "would be of great public benefit:" but, as to the alterations, it is only stated that they would be "expedient." Sect. 11 marks the same distinction: the Company are "to

(a) *Ante*, p. 858.

make and maintain" the two lines; "and, if they think fit," to make certain branch lines and the alterations in the main line. So, again, by sect. 13, the two lines "shall commence" and "shall terminate;" but, as to the branch lines, the words are changed to "the said branch railways, if the same shall be constructed, shall be made." It seems, taking all these sections together, that the intention was that the branch lines and alterations should be made "if the Company thought fit," as it was expedient that they should be; but that the two lines, the "making of which would be of great public advantage," should be made at all events. [*Cresswell J.* Sect. 30 may in some degree explain the change of language on which you rely. It is lawful for the Company to make the two lines, and the branch lines: but, if they think fit, the Company may allow the branch lines to be made by other persons.]

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Butt was not called on to reply.

JERVIS C. J. We are all of opinion that this case is governed by the decision in *York and North Midland Railway Company v. The Queen* (a), and that the difference in the language is explained, as my brother *Cresswell* points out, by the power to lease the line given in sect. 30. In the same way, by sect. 5, "it shall be lawful" to raise money by mortgage; and, by sect. 7, the Company are empowered, "if they think fit," to raise the money by new shares. It is clear that in both cases the words are permissive.

(a) *Ante*, p. 858.

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I wish to notice one point, lest, by passing it over, I should be understood to assent to the doctrine laid down in the Court below, as to the effect of the expiration of the powers of the Company, after the return, but before the peremptory mandamus was awarded. It is not necessary to decide this point: but I consider it one well worthy of much consideration. There is a very great difference between an indictment for not fulfilling a public duty, and a mandamus commanding the party liable to fulfil it.

PARKE B. I perfectly concur with my Lord Chief Justice; and upon both points.

The rest of the Court (a) concurred.

Judgment reversed.

(a) *Pollock C. B., Cresswell and Williams Js., Mutt and Martin Bs.*

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IN THE EXCHEQUER CHAMBER.

[Thursday,
May 4th.]

(Error from the Queen's Bench.)

BODDINGTON *against* CASTELLI.

THE Court of Queen's Bench having given judgment for the plaintiff below, on demurrer to the fourth plea, and the rejoinder to the sixth plea, the defendant below brought error.

The pleadings are stated in the report of the case below (a).

The case was argued in this term (b).

Bramwell, for the plaintiff in error, defendant below. The principal question arises on the rejoinder to the replication to the plea of bankruptcy. The facts disclosed on the record are, that there was one contract by

Assumpsit to recover a partial loss on a valued policy of insurance on goods on a voyage to a market: premium 60 per cent., to return 23s. 9d. if landed in the United Kingdom.

Plea: 1: Set-off for premiums. Demurrer. Held by the Court of Exchequer Chamber, affirming the

judgment of the Queen's Bench, a bad plea.

Plea. 2. Bankruptcy of plaintiff before action. Replication: A transfer of the goods, with an assignment of the contract of insurance, to *F.*, before the bankruptcy, with an averment that plaintiff sued as trustee for *F.* Rejoinder: that the risk ended in the *United Kingdom* before bankruptcy; and that the right to have a return of premium was not transferred from plaintiff before bankruptcy. Demurrer.

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that, the causes of action being both vested in the plaintiff before bankruptcy, and being such that distinct actions might have been brought by him whilst *auti juris*, the plaintiff was entitled to sue in his own name as trustee for that cause of action in which he had no beneficial interest at the time of his bankruptcy.

Per *Jervis C. J.*, *Cresswell* and *Williams Js.*, *Parke*, *Platt* and *Martin Bs.*, dubitante *Pollock C. B.*, it would have been otherwise had the plaintiff then had any beneficial interest, however small, in the cause of action itself.

(a) *Castelli v. Boddington*, ante, p. 66.

(b) April 29th and 30th. Before *Jervis C. J.*, *Pollock C. B.*, *Cresswell* and *Williams Js.*, and *Parke*, *Platt* and *Martin Bs.*

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which *Boddington*, defendant below, promised *Castelli*, on the happening of one event, to pay him a sum of money by way of return of premium; and also promised to indemnify him against loss on certain goods. So that it was one contract with two branches. And the action is brought, in *Castelli*'s name, for not indemnifying him; to which *Castelli*'s bankruptcy is pleaded. At common law, *Castelli* is the person entitled as plaintiff to maintain any action on the contract made with him. But the bankruptcy of a trader, by force of the bankrupt laws, transfers all his personal estate, including choses in action, to his assignees. On this enactment the cases have engrafted a qualification, that personal estate shall include only those choses in action in which the bankrupt has a beneficial interest. The replication to the plea of bankruptcy shews that *Castelli* had no beneficial interest in the performance of that branch of the contract on which the action is brought, viz.: the promise to indemnify against loss on the goods; for, before bankruptcy, all benefit to arise from that promise had been by him transferred to Messrs. *Fuidge*, the purchasers of the goods; and, if that stood alone, the right to sue would not pass to the assignees. But it is shewn by the rejoinder that the other event also had happened, and that *Castelli* was before his bankruptcy entitled to a return of premium. The beneficial interest in the performance of that branch of the contract was not transferred to Messrs. *Fuidge*; it unquestionably remained in *Castelli* till his bankruptcy, and then passed to the assignees: and there can be no doubt they might bring an action to recover that sum. The decision of the Court below is that, though the assignees are the only persons who can bring an action on the contract for the

non-performance of one branch of it, yet *Castelli* also may bring an action in his name for the non-performance of the other branch. This would divide one entire contract into two, an anomaly for which there is no authority. In the Court below, the question is treated by the Judges as though there were two contracts: as if the promise to return the premium was a promise implied by law from the failure of consideration; but that is a mistake. The promise to return premium here is an express promise, founded on the same consideration as the promise to indemnify. It is a case of mutual promises: in consideration that *Castelli* promises to fulfil his part of the contract contained in the policy, *Boddington* promises to fulfil his. It happens that *Boddington's* part of the contract has two incidents; but still there is but one contract. The neglect to pay the return of premium might have been assigned as a breach, as it was in *Kellner v. Le Mesurier* (a) and *Aguilar v. Rodgers* (b): and, if this had been a contract under seal, that would have been necessary. Then, that being so, the state of things at the time of the bankruptcy is to be looked at. If there is then no beneficial interest in the bankrupt, the contract does not pass. If the whole beneficial interest is in him, the contract does pass. In the third case, in which the beneficial interest is partly in the bankrupt, and partly not, the contract also passes to the assignees, who then take for the benefit of the estate what belonged to the bankrupt, and are trustees as to the residue for those interested. [*Pollock C. B.* I know that it has been decided that, if there is the smallest scintilla of interest left in the bankrupt, the

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(a) 4 *East*, 396.(b) 7 *T. R.* 421.

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assignees must take the entire legal interest, as trustees as to the residue. But, sitting here in a Court of Error, I am at liberty to question the principle on which that has been decided. It is not very consistent with *Willis v. Freeman* (a).] That case, if it decided that there can be, at one and the same time, two holders of a bill of exchange, is an authority for the defendant in error; but such a proposition can hardly be law. The facts are a little complicated; but the case, when examined, has not such an effect. [*Parke B.* No: the Court of King's Bench decided the case on the ground that the whole bill passed to the plaintiff, and that he alone could sue on it, though he could not recover the whole amount. They expressly say that the assignees had no right to sue on the bill for any amount (b).] The real question is, whether, at the time of the bankruptcy, the bankrupt had any beneficial interest in the contract? If he had, it passed to his assignees; for the contract is indivisible; *Reid v. Furnival* (c).

As to the plea of set-off, it has been held that such a plea is issuable; *Thomson v. Redmond* (d). [*Cresswell J.* It does not appear that the plea in *Thomson v. Redmond* (d) was persevered in and argued on demurrer. If it was, I think it probably was unsuccessful. But the plea in *Thomson v. Redmond* (d) had more of the character of a plea than the one now before us; for the policy was one on which the loss was total.]

Watson, contra. The rejoinder is bad in substance. At the time of the bankruptcy there were two distinct causes of action: both, at law, vested in *Castelli*. The

(a) 12 *East*, 656.

(c) 1 *C. & M.* 538.

(b) 12 *East*, 661.

(d) 11 *M. & W.* 487.

beneficial interest in one of those remained in *Castelli* up to his bankruptcy, and then passed to his assignees; but the beneficial interest in the other had been assigned to Messrs. *Fudge*. Why should that cause of action pass to the assignees? It was entirely in the option of Messrs. *Fudge* to order the vessel to what port they pleased, so that the premium might never have been returnable at all. [*Parke B.* The proper person to sue on a chose in action is fixed for ever at the time of the bankruptcy; it cannot vary with the subsequent state of things. That was determined in *Carvalho v. Burn* (a) and *Burn v. Carvalho* (b).] The defendant in error may admit that it is so; and, further, that in this case the right to sue for the return of premium passed to the assignees. That consequence follows from the enactment in the bankrupt acts, vesting in the assignees all the bankrupt's personal estate (stat. 12 & 13 *Vict. c. 106. s. 141.*). But the other cause of action, on the right to be indemnified against damage to the goods, was not personal estate of the bankrupt: for it had been assigned to Messrs. *Fudge*, and was their personal estate. Though the two causes of action arose out of the same contract, they are distinct. [*Williams J.* Suppose there were a deed by which a man covenanted to pay a trader an annuity, and one annual payment was due, and the beneficial interest in that year's payment was assigned; and then another year's payment became due, and the beneficial interest in that was not assigned; and then the covenantor became bankrupt. Who would sue?] The

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(a) 4 *B. & Ad.* 382.(b) 1 *A. & E.* 883, in *Exch. Ch.*, affirming the judgment of *K. B.*, in *Carvalho v. Burn*, 4 *B. & Ad.* 382.

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transferee, in the name of the bankrupt, for the first year's payment, which was the personal estate of the transferee; the assignees of the bankrupt for the subsequent payments, which, being personal estate of the bankrupt, passed to his assignees. Though the two causes of action arise from the same contract, they are quite distinct. They might be sued for in separate actions; the statute of limitations would bar them at different times; they are in every sense severable. The estate can have no benefit from the performance of the subject matter of the present action; and under the words "personal estate" there pass only those contracts the performance of which would be beneficial to the bankrupt's estate; *Beckham v. Drake* (a). There are no authorities to shew that a beneficial interest to the bankrupt's estate, in something collateral to the cause of action, necessarily passes it to the assignees. The first case on the subject is *Scott v. Surman* (b). There *Willes* C. J. says: "My notion is that assignees under a commission of bankruptcy are not to be considered as general assignees of all real and personal estate of which the bankrupt was seised and possessed, as heirs and executors are of the estates of their ancestors and testators; but that nothing vests in these assignees even at law but such real and personal estate of the bankrupt in which he had the equitable as well as the legal interest, and which is to be applied for the payment of the bankrupt's debts." But nothing is said there about the effect of a scintilla of interest. That

(a) 2 H. L. Ca. 579, affirming the judgment of Exch. Ch. in *Drake v. Beckham*, 11 M. & W. 315, which reversed the judgment of Exch. in *Beckham v. Drake*, 8 M. & W. 846.

(b) *Willes*, 400. 402.

was first said by Lord *Alvanley* in *Carpenter v. Mar-
nell* (a). He says: "If indeed they had possessed the
most remote possibility of interest, or if they could state
any thing from which a benefit to the creditors would
result, I should hold that the action might be main-
tained." But that was a mere dictum: it is nothing
but vehement declamation. [*Jervis* C. J. The doctrine
may have begun in vehemence; but it has been fol-
lowed up calmly. It was, I think, taken for granted in
D'Arnay v. Chesneau (b) and in *Beckham v. Drake* (c).
Parke B. The foundation of the doctrine is in *Scott*
v. Surman (d). It perhaps does not necessarily follow
from his language that *Willes* C. J. thought that, if
there was any beneficial interest in the bankrupt, the
whole legal interest must pass to his assignees; but it
looks very like it. And the proposition has repeatedly
been recognised since. But the point which you have
raised, whether the test is a beneficial interest in the
contract out of which a vested cause of action arises, or
a beneficial interest in the vested cause of action itself,
is well worth consideration.]

The plea of set-off cannot be maintained. [The Court
intimated that it was unnecessary for him to argue this
point.]

James Wilde (in the absence of *Bramwell*) was heard
in reply.

Cur. adv. vult.

JERVIS C. J., on a subsequent day in this term
(*May* 4th), delivered judgment.

(a) 3 B. & P. 40.

(b) 13 M. & W. 796.

(c) 2 H. L. Ca. 579.

(d) *Willes*, 400.

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We are of opinion that the judgment of the Court of Queen's Bench in this case should be affirmed. The question of set-off was disposed of during the argument. The other question arises thus. There is a policy of insurance made with the plaintiff on goods, from the *Havannah* to a market in *Europe*, at 60*s.* per cent. premium, to return 23*s.* 9*d.* per cent. if the risk ended in the United Kingdom, and less if at other places in the north of *Europe*. The plaintiff sold the goods, whilst at sea, and transferred the policy and the right and interest of the plaintiff to recover for the loss of the goods to Messrs. *Fudge*, and delivered the policy to them. An average loss on the goods happened; the cargo was delivered; and the risk thereon ended in *England*: the plaintiff thereupon became entitled by virtue of the stipulation in the policy to a return of premium. He then became bankrupt; and the question is whether he can sue, after his bankruptcy, in his own name for the average loss.

It is contended for the defendant that he cannot, because the right to sue for a return of premium is transferred to the assignees (as it unquestionably is), and that right arises out of the contract in the policy itself, and is distinguishable on that ground from a claim of return of premium for short interest, or where the policy is void; and there is certainly that difference. Then it is contended that, both causes of action arising out of the same contract, the assignees have a direct interest for the benefit of the estate in the contract itself; and that the whole contract, with the existing causes of action upon it, is transferred to the assignees; or, at all events, that the bankrupt alone cannot sue for the breach of part of it, the non-payment of the average loss. We

think this reasoning is incorrect. If there had been a contract on which one action only could have been brought for both causes of action, as, for instance, if it had been a bond or an agreement with a penalty to secure the payment of the average loss and the return of premium, the argument would have been well founded. This point was decided in the House of Lords in the case of *Beckham v. Drake* (a). As the penalty could not be divided, and the bankrupt had an interest in the penalty to secure that, which was a part of the bankrupt's personal estate and consequently passed to the assignees, the bankrupt could not sue for it, certainly not alone; and there would be a good answer to an action by him. But this is a case in which there are two separate causes of action, totally distinct from each other, though arising upon the same instrument; and an action may be brought on each of them. It is similar, as my brother *Williams* observed, to a case where there is a covenant to pay an annuity, or a certain sum every year. A separate action may be brought for each year's annuity in arrear. There is no objection in point of law to these several actions, though the Court may, in the exercise of its equitable jurisdiction, consolidate the actions in order to prevent vexatious expence. The first cause of action in this case was for average loss: in that action the bankrupt had not the least beneficial interest; therefore no part of that cause of action passed to the assignees; and there is no reason whatever to prevent the bankrupt suing as a trustee for his vendees to recover all that can be recovered.

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(a) 2 H. L. Ca. 579.

1853. POLLOCK C. B. I perfectly concur in the judgment
BODDINGTON just given, and in the reasons: but I wish it to be under-
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CASTELLI. stood that, speaking for myself only, I should have been
by no means prepared to accede to the judgment if it
had been thought necessary to act on the position that,
where the trader assigns the benefit of an entire contract,
his transferee shall not be entitled to sue in his name as
trustee after bankruptcy, if at the time of the bankruptcy
there remained in the trader the smallest possibility of
beneficial interest. In *Beckham v. Drake* (a) the ques-
tion was between the assignees of the trader, and the
trader himself suing for his own benefit. I am not pre-
pared to hold that the right of a third party to sue
in the trader's name shall be defeated by the smallest
possibility of interest remaining in the trader.

Judgment affirmed.

(a) 2 H. L. Ca. 579.

The remaining cases of *Easter Term* will be found in
vol. II.

APPENDIX.

I.

REGULÆ GENERALES. HILARY TERM 1853. XVI. VICT.

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1853. WHEREAS the practice of the Courts of Queen's Bench, Common
 January 11th. Pleas, and Exchequer, in civil actions, in respect of which the
 said Courts possess a common jurisdiction, has been to a great
 extent superseded or altered by the Common Law Procedure Act,
 1852, and it is expedient that the written rules of practice of the
 said Courts should be consolidated and rendered uniform: It is
 ordered, that all existing written rules of practice in any of the
 said Courts in regard to such civil actions, save and except as regards
 any step or proceeding heretofore taken, shall be and the same are
 hereby annulled, and that the practice to be observed in the said
 Courts with respect to the matters hereafter mentioned shall be as
 follows; that is to say,

Writ of Summons.

1. When a writ of summons is indorsed in the special form
 mentioned in sec. 27. of the Common Law Procedure Act, 1852,
 the following are the amounts which may be indorsed by the
 plaintiff's attorney or agent upon the writ for costs; and to include
 mileage:

In Actions above 20l.				£ s. d.
In town causes	-	-	-	3 8 0
In country or agency cases (including				
mileage)	-	-	-	4 0 0
In Actions under 20l.				
In town causes	-	-	-	2 14 0
In country or agency cases (including				
mileage)	-	-	-	3 2 0

Where the plaintiff's attorney, at the time of issuing the writ,
 claims more than the sums fixed as above, the indorsement on the
 writ of summons in respect of costs shall be as follows: "Such
 sum as shall be allowed on taxation for costs." And in case the
 plaintiff shall be found not entitled to more costs than such fixed

sums, or if more than one sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation. So if the attorney has indorsed on the writ one of the fixed sums for the costs of judgment, and claims more costs on signing judgment, and on taxation shall be found not entitled to more than such sum, or if more than one sixth be taken off on taxation, the plaintiff's attorney shall in like manner pay the costs of taxation.

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Appearance.

2. If two or more defendants in the same action shall appear by the same attorney and at the same time, the names of all the defendants so appearing shall be inserted in one appearance.

Attorney and Guardian.

3. An attorney not entering an appearance in pursuance of his undertaking shall be liable to an attachment.

4. No attorney shall be changed without the order of a Judge.

5. A special admission of prochein amy, or guardian, to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified.

Joinder of Parties.

6. Whenever a plaintiff shall amend the writ after notice by the defendant, or a plea in abatement of a nonjoinder, by virtue of the Common Law Procedure Act, 1852, sect. 36, he shall file a consent in writing of the party or parties whose name or names are to be added, together with an affidavit of the hand-writing, and give notice thereof to the defendant, unless the filing of such consent be dispensed with by order of the Court or a Judge.

Pleadings.

7. No side bar rule for time to declare shall be granted.

8. The defendant shall not be at liberty to waive his plea, or enter a relicta verificationes after a demurrer, without leave of the Court or a Judge, unless by consent of the plaintiff or his attorney.

9. In case the time for pleading to any declaration or for answering any pleadings, shall not have expired before the 10th day of August in any year, the party called upon to plead, reply, &c. shall have the same number of days for that purpose after the 24th day of October as if the declaration or preceding pleading had been delivered or filed on the 24th of October.

10. Where a defendant shall plead a plea of judgment recovered, he shall in the margin of such plea state the date of such judgment, and if such judgment shall be in a Court of record, the number

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of the roll on which such proceedings are entered, if any; and, in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the Court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea.

Payment of Money into Court.

11. No affidavit shall be necessary to verify the plaintiff's signature to the written authority to his attorney to take money out of Court, unless specially required by the Master.

12. When money is paid into Court in respect of any particular sum or cause of action in the declaration, and the plaintiff accepts the same in satisfaction, the plaintiff, when the costs of the cause are taxed, shall be entitled to the costs of the cause in respect of that part of his claim so satisfied, up to the time the money is so paid in and taken out, whatever may be the result of any issue or issues in respect of other causes of action, and if the defendant succeeds in defeating the residue of the claim, he will be entitled to the costs of the cause in respect of such defence, commencing at "Instructions for Plea," but not before.

13. Where money is paid into Court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into Court.

Demurrer.

14. The party demurring may give a notice to the opposite party to join in demurrer in four days, which notice may be delivered separately or indorsed on the demurrer, otherwise judgment.

15. No motion or rule for a concilium shall be required; but demurrers, as well as all special cases, special verdicts, and appeals from county courts, shall be set down for argument in the special paper at the request of either party, four clear days before the day on which the same are to be argued, and notice thereof shall be given forthwith by such party to the opposite party.

16. Four clear days before the day appointed for argument the plaintiff shall deliver copies of the demurrer book, special case, special verdict, or appeal cases, with the points intended to be insisted on, to the Lord Chief Justice of the Queen's Bench or Common Pleas, or Lord Chief Baron, as the case may be, and the senior Puisne Judge of the Court in which the action is brought; and the

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defendant shall deliver copies to the other two Judges of the Court next in seniority; and in default thereof by either party, the other party may on the day following deliver such copies as ought to have been so delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Master a sufficient sum to pay for such copies. If the statement of the points have not been exchanged between the parties, each party shall, in addition to the two copies left by him, deliver also his statement of the points to the other two Judges, either by marking the same in the margin of the books delivered, or on separate papers.

17. When there shall be a demurrer to part only of the declaration or other subsequent pleadings, those parts only of the declarations and pleadings to which such demurrer relates shall be copied into the demurrer books; and if any other parts shall be copied, the Master shall not allow the costs thereof on taxation, either as between party and party, or as between attorney and client.

Venue, Change of.

18. No venue shall be changed without a special order of the Court or a Judge, unless by consent of the parties.

Particulars of Demand or Set-off.

19. With every declaration, (unless the writ has been specially indorsed under the provisions contained in the 25th section of the Common Law Procedure Act, 1852,) delivered or filed, containing causes of action such as those set forth in Schedule B. of that Act, and numbered from 1. to 14., inclusive, or of a like nature, the plaintiff shall deliver or file full particulars of his demand under such claim, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver or file such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios; and with every plea of set-off containing claims of a similar nature as those in respect of which a plaintiff is required to deliver or file particulars, the defendant shall in like manner deliver particulars of his set-off. And to secure the delivery or filing of particulars in all such cases, it is ordered, that if any such declaration shall be delivered or filed, or any plea of set-off delivered, without such particulars or such statement as aforesaid, and a Judge shall afterwards order a delivery of particulars, the plaintiff or defendant, as the case may be, shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver; and a copy of the particulars of the demand, and set-off, shall be annexed by the

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plaintiff's attorney to every record at the time it is entered with the proper officer.

20. A summons for particulars, and order thereon, may be obtained by a defendant before appearance, and may be made, if the Judge think fit, without the production of any affidavit.

21. A defendant shall be allowed the same time for pleading after the delivery of particulars under a Judge's order which he had at the return of the summons, unless otherwise provided for in such order.

Security for Costs.

22. An application to compel the plaintiff to give security for costs must, in ordinary cases, be made before issue joined.

Discontinuance.

23. To entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent that if they are not paid within four days after taxation defendant shall be at liberty to sign judgment of non pros.

Staying Proceedings.

24. In any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings, on payment of the debt and costs in that action only.

Cognovit ; Warrant of Attorney ; Judge's Order for Judgment.

25. No judgment shall be signed upon any cognovit or any warrant of attorney without such cognovit or warrant being delivered to and filed by the Master, who is hereby ordered to file the same in the order in which it is received.

26. Leave to enter up judgment on a warrant of attorney above one and under ten years old, is to be obtained by order of a Judge made ex parte, and if ten years old or more, upon a summons to show cause.

27. Every attorney or other person who shall prepare any warrant of attorney to confess judgment which is to be subject to any defeasance shall cause such defeasance to be written on the same paper or parchment on which the warrant is written, or cause a memorandum in writing to be made on such warrant, containing the substance and effect of such defeasance.

28. The costs of filing a judge's order for judgment against a trader defendant under the Bankrupt Act, shall not be allowed unless specially ordered by the Judge.

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Evidence; Admission and Inspection of Documents;
Subpoena to Produce Records; Depositions on Interrogatories.

29. The form of notice to admit documents referred to in the Common Law Procedure Act, 1852, section 117, may be as follows:—

In the Q. B. }
C. P. } A. B. v. C. D.
or Exchequer.

Take notice, that the { Plaintiff } in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the { Defendant, } his attorney or agent, at , on , between the hours of ; and the { Defendant } is hereby required, within 48 hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause.
Dated, &c.

To E. F., Attorney

G. H., Attorney

or [“Agent”] for { Defendant } [or [“Agent”] for { Plaintiff }
Plaintiff. } Defendant. }

[Here describe the documents, the manner of doing which may be as follows:]

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ORIGINALS.

Description of the Documents.	Date.
Deed of Covenant between A. B. and C. D. } 1st part; and E. F. 2d part - - }	1st January 1848.
Indenture of Lease from A. B. to C. D. -	1st February 1848.
Indenture of Release between A. B., C. D., } 1st part, &c. - - - - }	2d February 1848.
Letter, Defendant to Plaintiff - -	1st March 1848.
Policy of Insurance on Goods by ship Isabella } on voyage from Oporto to London - }	3d December 1847.
Memorandum of Agreement between C. D., } Captain of said Ship, and E. F. - }	1st January 1848.
Bill of Exchange for 100l. at Three Months, } drawn by A. B. on and accepted by C. D., } endorsed by E. F. and G. H. - - }	1st May 1849.

COPIES.

Description of Documents.	Dates.	Original or Duplicate, served, sent, or delivered, when, how, and by whom.
Register of Baptism of } A. B. in the Parish of } X. - - - }	1st January 1808.	{ Sent by General Post, 2d February 1848. Served 2d March 1848, on defendant's attorney, by E. F. of——.
Letter—Plaintiff to Defendant - - }	1st February 1848.	
Notice to produce papers	1st March 1848 -	
Record of a judgment of } the Court of Queen's } Bench in an action, } J. S. v. J. N. - }	Trinity Term, 10th Vict.	
Letters patent of King } Charles II. in the Rolls } chapel - - }	1st January 1680.	

30. In all cases of trials, writs of inquiry, or inquisitions of any kind, either party may call on the other party, by notice, to admit documents in the manner provided by and subject to the provisions of the Common Law Procedure Act, 1852; and in case of the refusal

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or neglect to admit after such notice given, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial or inquisition the Judge or presiding officer shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is in the opinion of the Master a saving of expense.

31. An order upon the lord of a manor, to allow the usual limited inspection of the Court rolls, on the application of a copyhold tenant, may be absolute in the first instance, upon an affidavit that the copyhold tenant has applied for and been refused inspection.

32. No subpoena for the production of an original record shall be issued unless a rule of Court or the order of a Judge shall be produced to the officer issuing the same, and filed with him, and unless the writ shall be made conformable to the description of the document mentioned in such rule or order.

33. All depositions of witnesses taken under the order of a Judge, rule of Court, or writ of commission, shall be returned to and filed in the office of the Masters of the Court in which the action or proceeding is pending.

Trial, Notice of Trial, and Inquiry.

34. Notice of trial or inquiry, and of continuance of trial or inquiry, shall be given in town; but countermand of notice of trial or inquiry may be given either in town or country, unless otherwise ordered by the Court or a Judge.

35. The expression "Short notice of trial," or "Short notice of inquiry," shall in all cases be taken to mean four days.

36. Notice of trial or inquiry may be continued to any sitting in or after term, on giving a notice of continuance four days before the time mentioned in the notice of trial or inquiry, unless short notice of trial or inquiry has been given, in which cases two days previous notice shall be sufficient, unless otherwise ordered by the Court, or a Judge, or by consent.

37. Countermand of notice of inquiry shall be given four days before the day of inquiry mentioned in the notice, unless short notice of inquiry has been given, and then two days before such day, unless otherwise ordered by the Court, or a Judge, or by consent.

38. On a replication or other pleading denying the existence of a record pleaded by the defendant, a rule for the defendant to produce the record shall not be necessary or used, and instead thereof a four days' notice shall be substituted, requiring the defendant to produce the record, otherwise judgment.

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39. The costs of the day for not proceeding to trial or to execute a writ of inquiry may be obtained by a side bar rule, on the usual affidavit.

40. In all cases where the plaintiff's pleading is in denial of the pleading of the defendant, without joining issue, the plaintiff's attorney may give notice of trial at the time of delivering his replication or other subsequent pleading; and in case issue shall afterwards be joined, such notice shall be available; but if issue be not joined on such replication, or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as aforesaid; and in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case the defendant pleads a plea in bar or rejoinder, &c., to which the plaintiff demurs, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of such demurrer.

41. Notice of a trial at bar shall be given to the Masters of the Court before giving notice of trial to the party.

42. No trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, and no rule for a trial by proviso shall be necessary.

43. All causes to be entered for trial in London and Middlesex shall be entered as follows; that is to say, if notice of trial shall be given for any sitting within term, two days before the day of sitting; and if for a sitting after term, before eight o'clock, r.m., of the day before the first day of such sitting, and if the same shall not be so entered for such sittings respectively, a ne recipiatur may be entered.

Jury and View.

44. No rule for a special jury shall be granted on behalf of any defendant (or plaintiff in replevin), except on an affidavit, either stating that no notice of trial has been given, or if it has been given, then stating the day for which such notice has been given; and in the latter case, no such rule is to be granted unless such application is made for it more than six days before that day; provided that a judge may, on summons, order a rule for a special jury to be drawn up at any time.

45. No cause shall be tried by a special jury in Middlesex or London, unless the rule for such special jury be served, and the cause marked in the Associate's book as a special jury cause, on or before

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the day preceding the day appointed in Middlesex and London respectively for the trial of special juries.

46. There shall be no rule for the sheriff to return a good jury upon a writ of inquiry, but an order shall be made by a judge upon summons for that purpose.

47. Sheriffs, other than the sheriffs of London and Middlesex shall, seven days before the commission day, make and keep at their offices, for inspection, a printed copy of the panel of the special jurymen to try the special jury causes at the assizes, as directed by the Common Law Procedure Act, 1852; but such special jury need not be summoned, except notice be given as provided for by the 112th section of the said Act.

48. The rule for a view may in all cases be drawn up by the officer of the Court, on the application of the party, without a motion for that purpose.

49. Upon any application for a view, there shall be an affidavit, stating the place at which the view is to be made, and the distance thereof from the office of the under sheriff, and the sum to be deposited in the hand of the under sheriff shall be 10*l.* in case of a common jury, and 16*l.* in case of a special jury, if such distance do not exceed 5 miles, and 15*l.* in case of a common jury, and 21*l.* in case of a special jury, if it be above 5 miles. And if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the attorney of the party who obtained the view; and if such sum shall not be sufficient to pay such expenses, the deficiency shall forthwith be paid by such attorney to the under sheriff. And the under sheriff shall pay and account for the money so deposited according to the scale following; (that is to say,)

£ s. d.

For travelling expenses to the under sheriff, showmen and jurymen, expenses actually paid, if reasonable.

Fee to the under sheriff, when the distance does not ex-

ceed five miles from his office - - - - - 1 1 0

Where such distance exceeds five miles - - - - - 2 2 0

And in case he shall be necessarily absent more than one

day, then for each day after the first a further fee of - 1 1 0

Fee to each of the showmen the same as the under sheriff, calculating the distance from their respective places of abode,

Fee to each common jurymen, per diem - - - - - 0 5 0

For each special jurymen, per diem - - - - - 1 1 0

Allowance for refreshment to the under sheriff, showmen, and jurymen, whether common or special, each, per

diem - - - - - 0 5 0

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To the bailiff for summoning each jurymen whose residence is not more than five miles distant from the office of the under sheriff - - - - - 0 2 6
 And to each whose residence does exceed five miles of such distance - - - - - 0 5 0

New Trials, Motions in Arrest of Judgment, and Judgment Non Obstante Veredicto.

50. No motion for a new trial, or to enter verdict or nonsuit, motion in arrest of judgment, or for judgment non obstante veredicto, shall be allowed after the expiration of four days from the day of trial, nor in any case after the expiration of the Term, if the cause be tried in Term, or after the expiration of the first four days of the ensuing Term when the cause is tried out of Term, unless entered in a list of postponed motions by leave of the Court.

51. No suitor who appears in person shall be at liberty to set down any motion in such list of postponed motions, without the express leave of the Court.

52. No affidavit shall be used in support of a motion for a new trial in any case, unless such affidavit shall have been made within the time limited for the making such motion, without the special permission of the Court for that purpose.

53. If such motion as above mentioned be entered in such list of postponed motions, or if such motion be postponed by leave of the Court in the case of a cause tried in Term, the attorney who has instructed counsel to make the motion shall give notice of it to the attorney of the opposite party, otherwise judgment signed on behalf of the opposite party shall be deemed regular, and every suitor who appears in person shall give a similar notice.

54. If a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second.

Judgment.

55. No rule for judgment shall be necessary; and after the return of a writ of inquiry judgment may be signed at the expiration of four days from such return.

56. All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day; but it shall be competent for the Court or a Judge to order a judgment to be entered nunc pro tunc.

57. When a plaintiff or defendant has obtained a verdict in Term, or in case a plaintiff has been nonsuited at the trial in or out of Term, judgment may be signed and execution issued thereon in fourteen

days, unless the Judge who tries the cause, or some other Judge, or the Court, shall order execution to issue at an earlier or later period, with or without terms.

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58. Where issue shall be joined in any cause which is ordered to be tried before the Sheriff or a Judge of an inferior Court of Record, the defendant may at the time when, according to the 101st section of the Common Law Procedure Act, 1852, a defendant might give notice to the plaintiff to bring on an issue to be tried, give twenty days' notice to the plaintiff to bring on the issue to be tried before such Sheriff or Judge at the Court to be holden next after the expiration of such twenty days; and if the plaintiff neglects to give notice of trial before such Sheriff or Judge, or to proceed to trial in pursuance thereof, the defendant may proceed as provided for by the said 101st section.

Costs ; Setting off Damages or Costs.

59. One day's notice of taxing costs, together with a copy of the bill of costs and affidavit of increase (if any), shall be given by the attorney of the party whose costs are to be taxed to the other party, or his attorney, in all cases where a notice to tax is necessary.

60. One appointment only shall be deemed necessary for proceeding in the taxation of costs or of an attorney's bill.

61. Notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or by his attorney or guardian.

62. When issues in law and fact are raised, the costs of the several issues both in law and fact will follow the finding or judgment, and if the party entitled to the general costs of the cause obtain a verdict on any material issue, he will also be entitled to the general costs of the trial; but if no material issue in fact be found for the party otherwise entitled to the general costs of the cause, the costs of the trial shall be allowed to the opposite party.

63. No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought; provided nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted.

Error.

64. Within eight days after the filing with the Master of the memorandum of error in fact, required by the Common Law Procedure Act, 1852, the plaintiff in error shall assign error; and in default, the defendant in error, his executors or administrators, shall be entitled to sign judgment of non pros.

65. No rule to plead to assignment of error in fact, or any other pleadings in error, shall be necessary, but either party may give to

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the opposite party a notice to answer such pleading within four days, otherwise judgment; which notice may be delivered separately, or indorsed on the pleading.

66. Notice of trial, and all other proceedings thereon, shall be the same as in issues joined in an ordinary action.

67. After the suggestion of error in law, alleged and denied as prescribed by the Common Law Procedure Act, 1852, is entered, either party may set down the case for argument, and forthwith give notice in writing to the opposite party, and proceed to the argument thereof as on a demurrer, without any rule or motion for a concilium.

68. Four clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the judgment roll of the Court below to the Judges of the Queen's Bench on error from the Common Pleas or Exchequer, and to the Judges of the Common Pleas on error from the Queen's Bench; and the defendant in error shall deliver copies thereof to the other Judges of the Court of Exchequer Chamber before whom the case is to be heard; and in default by either party, the other party may on the following day deliver such books as ought to have been delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Master a sufficient sum to pay for such copies.

69. The costs of proceedings in error shall be taxed and allowed as costs in the cause.

Execution.

70. It shall not be necessary, before issuing execution upon any judgment whatever, to enter the proceedings upon any roll.

71. No writ of execution shall be issued till the judgment paper, postea, or inquisition, as the case may be, has been seen by the proper officer, nor shall any writ of execution be issued without a præcipe being filed with the proper officer.

72. Every writ of execution shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chief Justice or of the Lord Chief Baron of the Court from which the same shall issue, or in case of a vacancy of such office then in the name of the senior Puisne Judge of the said Court, and may be made returnable on a day certain in term.

73. Every writ of execution shall be endorsed with the name and place of abode or office of business of the attorney actually suing out the same, and in case such attorney shall not be an attorney of the Court in which the same is sued out, then also with the name and place of abode or office of business of the attorney of such Court in whose name such writ shall be taken out; and when the attorney actually suing out any writ shall sue out the same as agent for an

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attorney in the country, the name and place of abode of such attorney in the country shall also be endorsed upon the said writ; and in case no attorney shall be employed to issue the writ, then it shall be endorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's or defendant's residence, if any such there be.

74. Writs of *capias ad satisfaciendum* for the purposes of outlawry on final process, or to fix bail, must be made returnable on a day certain in term, and may be so returnable on any day in term, and it shall be sufficient for either purpose that there be eight days between the teste and return.

75. A writ of *capias ad satisfaciendum* to fix bail shall have eight days between the teste and return, and must, in London and Middlesex, be entered four clear days in the public book at the sheriff's office.

76. Every writ of execution shall be endorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered, under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of four pounds per centum per annum from the time when the judgment was entered up, or if it was entered up before the 1st of October 1838, then from that day; provided that in cases where there is an agreement between the parties that more than four per cent. interest shall be secured by the judgment, then the endorsement may be accordingly to levy the amount of interest so agreed.

77. In cases of an assessment of further damages, pursuant to the Statute of 8 & 9 William III., it shall be stated in the body of the writ of execution that the sheriff, or other officer or person to whom the writ is directed, is to levy interest on the damages assessed, and costs taxed in that behalf, at the rate of four pounds per centum per annum from the day on which execution was awarded, unless execution was awarded before the 1st of October 1838, and in that case from that day.

Revivor and Scire Facias.

78. A plaintiff shall not be allowed a rule to quash his own writ of *scire facias* or *revivor*, after a defendant has appeared, except on payment of costs.

Auditâ Querelâ.

79. No writ of *auditâ querelâ* shall be allowed unless by rule of Court or order of a Judge.

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Entry of Satisfaction on Roll.

80. In order to acknowledge satisfaction of a judgment it shall be requisite only to produce a satisfaction piece, in form as herein-after mentioned; and such satisfaction piece shall be signed by the party or parties acknowledging the same, or their personal representatives; and such signature or signatures shall be witnessed by a practising attorney of one of the Courts at Westminster expressly named by him or them, and attending at his or their request, to inform him or them of the nature and effect of such satisfaction piece before the same is signed, and which attorney shall declare himself, in the attestation thereto, to be the attorney for the person or persons so signing the same, and state he is witness as such attorney; [provided that a Judge at chambers may make an order dispensing with such signature under special circumstances, if he thinks fit,] and in cases where the satisfaction piece is signed by the personal representative of a deceased, his representative character shall be proved in such manner as the Master may direct.

FORM OF SATISFACTION PIECE.

In the

Monday, the day of A.D. 185 .

" to wit.—Satisfaction is acknowledged between

" Plaintiff, and Defendant in an

" action for and : And

" do hereby expressly nominate and appoint

" , Attorney-at-law, to witness and attest

" execution of this acknowledgment of satisfaction."

" Judgment entered on the day of in

" the year of our Lord 185 Roll No. ."

Signed by the said in the presence	} Signature.
of me of one of the attor-	
neys of the Court of at Westminster.	
And I hereby declare myself to be attorney for and	
on behalf of the said expressly named by	
h and attending at h request to inform h	} the above-named plain-
of the nature and effect of this acknowledgment of	
satisfaction (which I accordingly did before the	} tiff.
same was signed by h). And I also declare	
that I subscribe my name hereto as such attorney.	Date.

Bailable Proceedings, Bail, and Bail in Error.

81. The sheriff, or other officer or person to whom any writ of *capias* shall be directed, or who shall have the execution and return thereof, shall, within six days at least after the execution thereof, indorse on such writ the true day of the execution thereof.

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82. Where the defendant is described, in the writ of *capias* or affidavit to hold to bail, by initials, or by a wrong name, or without a Christian name, the defendant shall not be discharged out of custody, or the bail-bond delivered up to be cancelled, on motion for that purpose, if it shall appear to the Court that due diligence has been used to obtain knowledge of the proper name.

83. An Action may be brought upon a bail-bond by the Sheriff himself in any Court.

84. In all cases where the bail-bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it.

85. Proceedings on the bail-bond may be stayed on payment of costs in one action, unless sufficient reason be shown for proceeding in more.

86. When bail to the sheriff become bail to the action, the plaintiff may except to them, though he has taken an assignment of the bail-bond.

-- 87. A plaintiff shall not be at liberty to proceed on the bail-bond pending a rule to bring in the body of the defendant.

88. No rule shall be drawn up for setting aside an attachment, regularly obtained against a sheriff, for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail-bond, unless the application for such rule shall, if made on the part of the original defendant, be grounded on an affidavit of merits, or if made on the part of the sheriff, or bail, or any officer of the sheriff, be grounded on an affidavit, showing that such application is really and truly made on the part of the sheriff, or bail, or officer of the sheriff, as the case may be, at his or their own expense, and for his or their indemnity only, and without collusion with the original defendant.

89. Whenever a plaintiff shall rule the sheriff on a return of *cepi corpus* to bring in the body, the defendant shall be at liberty to put in and perfect bail at any time before the expiration of such rule; and, a plaintiff having so ruled the sheriff, shall not proceed on any assignment of the bail-bond, until the time has expired to bring in the body as aforesaid.

90. In case a rule for returning a writ of *capias* shall expire in vacation, and the sheriff or other officer having the return of such writ shall return *cepi corpus* thereon, a rule may thereupon issue, requiring the sheriff or other officer, within the like number of days after the service of such rule as by the practice of the Court is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into Court, by forthwith putting in and perfecting bail above to the action; and if the sheriff or other officer shall not duly obey such rule an attachment shall issue in the fol-

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lowing term for disobedience of such rule, whether the bail shall or shall not have been put in and perfected in the meantime.

91. Notice of more bail than two shall be deemed irregular, unless by order of the Court or a Judge.

92. The bail, of whom notice shall be given, shall not be changed without leave of the Court or a Judge.

93. No person or persons shall be permitted to justify himself or themselves as good and sufficient bail for any defendant or defendants if such person or persons shall have been indemnified for so doing by the attorney or attorneys concerned for any such defendant or defendants.

94. If any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, or a sheriff's officer, bailiff, or person concerned in the execution of process, the plaintiff may treat the bail as a nullity, and sue upon the bail-bond, as soon as the time for putting in bail has expired, unless good bail be duly put in in the meantime.

95. In the case of country bail, the bail-piece shall be transmitted and filed within eight days.

96. A defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose, before eleven o'clock in the morning, and exclusive of Sunday. If the plaintiff is desirous of time to inquire after the bail, and shall give one day's notice thereof as aforesaid to the defendant, his attorney or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days, then (unless the Court or a Judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the meantime.

97. Every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number (if any), where each of the bail resides, and all the streets or places, and numbers (if any), in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or freeholder.

98. If the notice of bail shall be accompanied by an affidavit of each of the bail, according to the following form, and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and, if such bail are rejected, the defendant shall pay the costs of opposition, unless the Court or a Judge thereof shall otherwise order.

FORM OF AFFIDAVIT OF JUSTIFICATION OF BAIL.

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In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," as the case may be].

Between *A.B.* Plaintiff and *C.D.* Defendant.

B.B., one of the bail for the above-named defendant, maketh oath, and saith, That he is a housekeeper [or "freeholder," as the case may be,] residing at [describing particularly the street or place, and number, if any]; that he is worth property to the amount of £ [the amount required by the practice of the Courts] over and above what will pay all his just debts, [if bail in any other action, add "and every other sum for which he is now bail"]; that he is not bail for any defendant except in this action [or, if bail in any other action or actions, add "except for *C.D.* at the suit of *E.F.* in the Court of in the sum of £ , for *G.H.* at the suit of *I.K.* in the Court of in the sum of £ " specifying the several actions, with the Courts in which they are brought, and the sums in which the deponent is bail]; that the deponent's property, to the amount of the said sum of £ [if bail in any other action or actions, here add "and of all other sums for which he is now bail as aforesaid"], consists of [here specify the nature and value of the property in respect of which the bail proposes to justify, as follows: "stock in trade, in his business of , carried on by him at , of the value of £ ; of good book debts owing to him to the amount of £ ; of furniture in his house at , of the value of £ ; of a freehold or leasehold farm of the value of £ , situate at , occupied by , or of a dwelling house of the value of £ , situate at , occupied by " ; or of other property, particularizing each description of property with the value thereof]; and that the deponent hath for the last six months resided at [describing the place or places of such residence].

Sworn [&c., as usual].

99. If the plaintiff shall not give one day's notice of exception to the bail by whom such affidavit shall have been made, the recognition of such bail may be taken out of Court without other justification than such affidavit.

100. Where notice of bail shall not be accompanied by such affidavit, and in bail in error, the plaintiff may except thereto within twenty days next after the putting in of such bail and notice thereof given in writing to the plaintiff or his attorney, or where special bail is put in before any Commissioner the plaintiff may except thereto within twenty days next after the bail-piece is transmitted

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and notice thereof given as aforesaid ; and no exception to bail shall be admitted after the time herein-before limited.

101. Affidavits of justification shall be deemed insufficient unless they state that each person justifying is worth double the amount sworn to over and above what will pay his just debts, and over and above every other sum for which he is then bail, except when the sum sworn to exceeds 1,000*l.*, when it shall be sufficient for the bail to justify in 1,000*l.* beyond the sum sworn to.

102. It shall be sufficient, in all cases, if notice of justification of bail be given two days before the time of justification.

103. In all cases bail either to the action or in error shall be justified, when required, within four days after exception, before a Judge at chambers, both in term and vacation.

104. Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognizance.

105. Bail shall be at liberty to render the principal at any time during the last day for rendering, so as they make such render before the prison doors are closed for the night.

106. On application by a defendant or his bail, or either of them, for an order to render a defendant to a county gaol, it shall be specified on whose behalf such application shall be made, the state of the proceedings in the cause, for what amount the defendant was held to bail, and by the sheriff of what county he was arrested, which facts shall be stated in the order ; and that on such order being lodged with the gaoler of the county gaol in which such defendant was so arrested, the defendant may be rendered to his custody in discharge of the bail ; and that on such lodgment and render a notice thereof, and of the defendant's being actually in custody thereon, in writing, signed by the defendant or his bail, or either of them, or the attorney or agent of any or either of them, shall be delivered to the plaintiff's attorney or agent, and thereupon the bail for the said defendant shall be wholly exonerated, without entering any exoneretur.

107. If a defendant shall be in custody of the gaoler of any county gaol by virtue of any process issued out of any of the said Courts, he may be rendered in discharge of his bail in any action depending in the said Court in like manner as is last herein-before provided, and thereupon the bail shall be wholly exonerated without entering any exoneretur.

108. Where the plaintiff proceeds by action on the recognizance of bail, the bail shall be at liberty to render their principal at any time within the space of eight days next after the service of the process upon them, but not at any later period : and notice thereof given, the proceedings shall be stayed upon payment of the costs of the writ and service thereof only.

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109. Bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognizance.

110. To entitle bail to a stay of proceedings pending a writ of error the application must be made before the time to surrender is out.

111. Whenever two or more notices of justification of bail shall have been given before the notice on which bail shall appear to justify, no bail shall be permitted to justify without first paying (or securing to the satisfaction of the plaintiff, his attorney or agent,) the reasonable costs incurred by such prior notices, although the names of the persons intended to justify, or any of them, may not have been changed, and whether the bail mentioned in any such prior notice shall not have appeared, or shall have been rejected.

Ejectment.

112. No judgment in ejectment for want of appearance or defence, whether limited or otherwise, shall be signed without first filing an affidavit of the service of the writ according to the Common Law Procedure Act, 1852, and a copy thereof, or, where personal service has not been effected, without first obtaining a Judge's Order or a Rule of Court authorizing the signing such judgment; which said Rule or Order, or a duplicate thereof, shall be filed together with a copy of the writ.

113. Where a person not named in the writ in ejectment has obtained leave of the Court or a Judge to appear and defend, he shall enter an appearance according to the Common Law Procedure Act, 1852, entitled in the action against the party or parties named in the writ as defendant or defendants, and shall forthwith give notice of such appearance to the plaintiff's attorney, or to the plaintiff if he sues in person.

114. If the plaintiff in ejectment appears at the trial, and the defendant does not appear, the defendant shall be taken to have admitted the plaintiff's title, and the verdict shall be entered for the plaintiff, without producing any evidence, and the plaintiff shall have judgment for his costs of suit as in other cases.

Causes Removed from Inferior Courts.

115. Rules to appear in causes removed from Inferior Courts shall in all cases be a four-day rule, both in term and vacation.

116. In cases of removal of causes from Inferior Courts by habeas corpus, where bail is required to be put in on behalf of the defendant, the same practice shall be used, as near as may be, as in putting in bail to an ordinary action, and in the event of no bail being put in within eight days after the habeas corpus allowed a procedendo may issue.

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117. If a cause be removed from an Inferior Court having jurisdiction of the cause, the costs in the Court below shall be costs in the cause.

Penal Actions, Compounding of.

118. Leave to compound a penal action shall not be given in cases where part of the penalty goes to the Crown, unless notice shall have been given to the proper officer; but in other cases it may.

119. The rule for compounding any *qui tam* action shall express therein that the defendant thereby undertakes to pay the sum for which the Court has given him leave to compound such action.

120. When leave is given by the Court of Queen's Bench to compound a penal action, the Queen's half of the composition shall be paid into the hands of the Master of the Crown Office for the use of Her Majesty.

Paupers, Actions by.

121. No person shall be admitted to sue in *forma pauperis* unless the case laid before counsel for his opinion, and his opinion thereon, with an affidavit of the party or his attorney that the same case contains a full and true statement of all the material facts, to the best of his knowledge and belief, shall be produced before the Court or Judge to whom application may be made; and no fees shall be payable by a pauper to his counsel and attorney, nor at the offices of the Masters, or Associates, or at the Judges Chambers, or elsewhere, by reason of a verdict being found for such pauper exceeding five pounds.

122. Where a pauper omits to proceed to trial, pursuant to notice, he may be called upon by a rule to show cause why he should not pay costs, though he has not been dispaupered, and why all further proceedings should not be stayed until such costs shall be paid.

Prisoners, and Proceedings against.

123. Every rule or order of a Judge directing the discharge of a defendant out of custody upon special bail being put in and perfected shall also direct a supersedeas to issue forthwith where defendant is in a county gaol.

124. The plaintiff shall proceed to trial, or final judgment, against a prisoner in the term next after issue is joined, or at the sittings or assizes next after such term, unless the Court or a Judge shall otherwise order, and shall cause the defendant to be charged in execution within the term next after such trial or judgment.

125. The keeper of the Queen's Prison shall present to the Judges of the Courts in their respective chambers at Westminster, within the first four days of every term, a list of all such prisoners as are supersedeable, showing as to what actions and on what account

they are so, and as to what actions (if any) they still remain not supersedeable.

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126. If, by reason of any writ of *error*, special order of the Court, agreement of parties, or other special matter, any person detained in the actual custody of the keeper of the Queen's Prison be not entitled to a supersedeas or discharge for want of proceeding to trial or judgment, or charging in execution, within the times prescribed, then and in every such case the plaintiff or plaintiffs at whose suit such prisoner shall be so detained in custody shall with all convenient speed give notice in writing of such writ of *error*, special order, agreement, or other special matter, to the keeper, upon pain of losing the right to detain such prisoner in custody by reason of such special matter; and the keeper shall forthwith after the receipt of such notice cause the matter thereof to be entered in the books of the prison, and shall also present to the Judges of the respective Courts, from time to time, a list of the prisoners to whom such special matter shall relate, showing such special matter, together with the list of the prisoners supersedeable.

127. All prisoners who have been or shall be in the custody of the keeper for the space of one calendar month after they are supersedeable, although not superseded, shall be forthwith discharged out of the Queen's Prison as to all such actions in which they have been or shall be supersedeable.

128. After notice given to any plaintiff by a prisoner of his intention to apply for his discharge under any Act for the Relief of Insolvent Debtors, no such prisoner shall be superseded or discharged out of custody at the suit of such plaintiff, by reason of such plaintiff's forbearing to proceed against him according to the rules and practice of the Courts from the time of such notice given, until some rule or order shall be made in the cause in that behalf.

129. A rule or order for the discharge of a prisoner who has been detained in execution a year for a sum under twenty pounds may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires.

Sheriffs.—Rules to return Writs or bring in the Body.

130. All rules upon the sheriffs of London and Middlesex to return writs or to bring in the bodies of defendants shall be four-day rules, and upon other sheriffs eight-day rules.

131. When the rule to return a writ expires in vacation, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall be open; and the officer with whom it is filed shall indorse the day and hour when it was filed.

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132. No Judge's order shall issue for the return of any writ, or to bring in the body of a defendant, but a side bar rule shall issue for that purpose in vacation as in term, which shall be of the same force and effect as side bar rules made for that purpose in term.

133. In case a rule shall issue in vacation for the return of any writ of *capias*, *ca. sa.*, *fi. fa.*, *elegit*, *habere facias possessionem*, *venditioni exponas*, or other writ of execution, and such rule shall have been duly served, but obedience shall not have been paid thereto, an attachment shall issue for disobedience of such rule, whether the thing required by such rule shall or shall not have been done in the meantime.

134. Where any sheriff, before his going out of office, shall arrest any defendant and take a bail bond and make return of *cepi corpus*, he shall and may within the time allowed by law be called upon to bring in the body by a rule for that purpose, notwithstanding he may be out of office before such rule shall be granted.

Irregularity.

135. No application to set aside process or proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity.

136. Where a summons is obtained to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated therein.

137. In all cases where a rule is obtained to show cause why proceedings should not be set aside for irregularity with costs, and such rule is afterwards discharged generally without any special direction upon the matter of costs, it is to be understood as discharged with costs.

Affidavits.

138. The addition and true place of abode of every person making an affidavit shall be inserted therein.

139. In every affidavit made by two or more deponents, the names of the several persons making such affidavit shall be written in the jurat.

140. No affidavit shall be read or made use of in any matter depending in Court in the jurat of which there shall be any interlineation or erasure.

141. Where any affidavit is sworn before any Judge or any Commissioner by any person who from his or her signature appears to be illiterate, the Judge's clerk or Commissioner taking such affidavit shall certify or state in the jurat that the affidavit was read in his presence to the party making the same, and that such party

seemed perfectly to understand the same, and also that the said party wrote his or her mark or signature in the presence of the Judge's clerk or Commissioner taking the said affidavit.

142. No affidavit of the service of process shall be deemed sufficient if sworn before the plaintiff's own attorney or his clerk.

143. Where an agent in town, or an attorney in the country, is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail.

144. An affidavit sworn before a Judge of any of the Courts shall be received in the Court to which such Judge belongs though not entitled of that Court, but not in any other Court unless entitled of the Court in which it is to be used.

145. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be made use of in Court or before the Master, unless by leave of a Court or a Judge.

146. No rule which the Court has granted upon the foundation of any affidavit shall be of any force unless such affidavit shall have been actually made before such rule was moved for, and produced in Court at the time of making the motion.

147. All affidavits used before a Judge out of Court shall be filed with the Masters of the said Courts, and be alphabetically indexed; and such affidavits shall be delivered to the Masters of the respective Courts, in order to be filed, ten days next after that on which the matter is disposed of.

148. No commission for taking affidavits shall be issued to any person practising as a conveyancer, unless such person be also an attorney or solicitor of one of the Courts at Westminster; and no such commission shall issue without an affidavit made by the person intended to be named therein, that he is not and does not intend to become a practising conveyancer, or that he is an attorney or solicitor duly enrolled in one of the said Courts, and hath taken out his certificate for the current year.

Rules, Summonses, and Orders.

149. Every rule of Court shall be dated the day of the week, month, and year on which the same is drawn up, without reference to any other time or date.

150. Side bar rules may be obtained on the last as well as on other days in Term.

151. A rule may be enlarged, if the Court think fit, without notice.

152. All enlarged rules shall be drawn up for the first day in the ensuing Term, unless otherwise ordered by the Court.

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153. It shall not be necessary to issue more than one summons for attendance before a Judge, upon the same matter, and the party taking out such summons shall be entitled to an order on the return thereof, unless cause is shown to the contrary.

154. An attendance on a summons, or on an appointment before a master, for half an hour next immediately following the return thereof shall be deemed a sufficient attendance.

155. All written consents upon which orders for signing judgments are obtained shall be preserved in the chambers of the Judges of the respective Courts.

156. In actions where the defendant has appeared by attorney no such order shall be made unless the consent of the defendant be given by his attorney or agent.

157. Where the defendant has not appeared or has appeared in person, no such order shall be made unless the defendant attends the Judge, and gives his consent in person, or unless his written consent be attested by an attorney acting on his behalf; except in a case where the defendant is a barrister, conveyancer, special pleader, or attorney.

158. Where a Judge's order is made during vacation, it shall not be made a rule of Court before the next Term.

159. When a Judge's order or order of *Nisi Prius* is made a rule of Court, it shall be a part of the rule that the costs of making the order a rule of Court shall be paid by the party against whom the order is made, provided an affidavit be made and filed that the order has been served on the party, his attorney or agent, and disobeyed.

160. Rules to show cause shall be no stay of proceedings unless two days notice of the motion shall have been served on the opposite party, except in the cases of rules for new trials, or to enter verdict or nonsuit, motion in arrest of judgment, or for judgment non obstante veredicto, to set aside award or annuity deed, or to enter a suggestion, or by the special direction of the Court.

Notices, Service of, and of Rules, Pleadings, &c.

161. All notices required by these rules, or by the practice of the Court, shall be in writing.

162. Where the residence of a defendant is unknown, rules, notices, and other proceedings may be stuck up in the office, but not without previous leave of the Court or a Judge.

163. It shall not be necessary to the regular service of a rule or order that the original rule or order should be shown, unless sight thereof be demanded, except in cases of attachment.

164. Service of pleadings, notices, summonses, orders, rules, and other proceedings shall be made before 7 o'clock, p.m. If

made after that hour, the service shall be deemed as made on the following day.

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166. The Masters of the several Courts shall cause to be kept an alphabetical book at their offices, to be there inspected by any attorney or his clerk, without fee or reward :—and every attorney practising in the said Courts, and residing within ten miles of the General Post Office, shall enter in such book (in alphabetical order) his name and place of business, or some other proper place, within three miles of the said post office where he may be served with pleadings, notices, summonses, orders, rules, and other proceedings ; and as often as any such attorney shall change his place of business, or the place where he may be so served as aforesaid, he shall make the like entry thereof in the said book ; and all pleadings, notices, summonses, orders, rules, and other proceedings which do not require a personal service shall be deemed sufficiently served on such attorney if a copy thereof shall be left at the place lastly entered in such book with any person resident at or belonging to such place ; and if any such attorney shall neglect to make such entry, the fixing up of any notice, or the copy of any pleadings, notice, summons, order, rule, or other proceeding, for such attorney, in the Master's offices, shall be deemed a sufficient notice.

166. In all cases where a party sues or defends in person, he shall, upon issuing any writ of summons or other proceeding, or entering an appearance, enter in a book to be kept for that purpose at the Master's office an address within three miles from the General Post Office at which all pleadings, notices, summonses, orders, rules, or other proceedings not requiring personal service shall be left ; and if such address shall not be entered in the said book, or if such address shall be more than three miles from the General Post Office, then the opposite party shall be at liberty to proceed by sticking up all pleadings, notices, summonses, orders, rules, or other proceedings in the Master's office without the necessity of any further service.

167. In all cases where a plaintiff shall have sued out a writ in person, or a defendant shall have appeared in person, and either party shall by an attorney of the Court have given notice in writing to the opposite party, or the attorney or agent of such party, of such attorney being authorized to act as attorney for the party on whose behalf such notice is given, all pleadings, notices, summonses, orders, rules, and other proceedings which according to the practice of the Courts are to be delivered to or served upon the party on whose behalf such notice is given shall thereafter be delivered to or served upon such attorney.

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Attachment.

168. Rules for attachment shall be absolutely in the first instance in the two following cases only; viz., first, for nonpayment of costs on a Master's allocatur; secondly, against a sheriff for not obeying a rule to return a writ or to bring in the body.

Awards and Annuities.

169. Where a rule to shew cause is obtained to set aside an award or an annuity, the several objections thereto intended to be insisted upon at the time of moving to make such rule absolute shall be stated in the rule to shew cause.

170. Costs may be taxed on an award, notwithstanding the time for setting aside the award has not elapsed.

Miscellaneous.

171. On a reference to the Master to ascertain the amount for which final judgment is to be signed, the Master's certificate shall be filed in the office when judgment is signed.

172. On every appointment made by the Master, the party on whom the same shall be served shall attend such appointment without waiting for a second, or in default thereof, the Master may proceed *ex parte* on the first appointment.

173. The Master's offices in the several Courts shall be open in term time, from eleven o'clock in the forenoon till five o'clock in the afternoon, and not in the evening; and in the vacation, from eleven o'clock in the forenoon till three o'clock in the afternoon, except between the 10th day of August and the 24th day of October, when they are to be open from eleven in the morning till two in the afternoon, and except on Good Friday, Easter Eve, Monday and Tuesday in Easter Week, Christmas Day, and the three following days, and such of the four following days as may not fall in the time of term, but not otherwise, namely, the Queen's Birthday, the Queen's Accession, Whit Monday, and Whit Tuesday, when the offices shall be closed.

174. In all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also.

175. The days between Thursday next before, and the Wednesday next after Easter Day, and Christmas Day and the three following days shall not be reckoned or included in any rules,

notices, or other proceedings, except notices of trial or notices of inquiry.

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176. In all causes in which there have been no proceedings for one year from the last proceeding had, the party, whether plaintiff or defendant, who desires to proceed shall give a calendar month's notice to the other party of his intention to proceed. The summons of a Judge, if no order be made thereupon, shall not be deemed a proceeding within this rule. Notice of trial, though afterwards countermanded, shall be deemed a proceeding within it.

Forms of Proceedings.

The forms of proceedings contained in the Schedule hereunder may be used in the cases to which they are applicable, with such alterations as the nature of the action, the description of the Court in which the action is depending, the character of the parties, or the circumstances of the case may render necessary; but any variance therefrom, not being in matter of substance, shall not affect their validity or regularity.

Schedule.

1.—FORM OF AN ISSUE IN GENERAL.

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," *as the case may be*].

The day of , in the year of our Lord 18
(*date of declaration*)

(*The Venue.*)—*A.B.* by *P.A.* his attorney [or "in person," *as the case may be, and as in the declaration,*] sues *C.D.*, who has been summoned to answer the said *A.B.* by virtue of a writ issued on the day of , in the year of our Lord , (*the date of the first writ*) out of Her Majesty's Court of Queen's Bench, [or "Common Pleas," or "Exchequer of Pleas," *as the case may be,*] For, [&c. *Copy the declaration from these words to the end, and all the pleadings, with their dates, writing each plea or pleading in a separate paragraph, and numbering the same as in the pleading delivered, and conclude thus :*] Therefore let a jury come, &c.

2.—FORM OF A NISI PRIUS RECORD.

The Nisi Prius record will be a copy of the issue as delivered in the action. It must be engrossed on parchment, and a more convenient shape than that heretofore in use must be adopted.

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3.—**FORM OF A POSTEA on a Verdict for Plaintiff on all the issues** where the Cause is tried in London or Middlesex, and where the Defendant appears at the Trial.

Afterwards on the day of , A.D. , (*the first day of the sittings*) at the Guildhall of the City of London [or "at Westminster Hall, in the county of "] Middlesex, before the Right Honourable John Lord Campbell, Her Majesty's Chief Justice assigned to hold pleas in the Court of our Lady the Queen before the Queen herself, [or *if in the Common Pleas* "before the Right Honourable Sir John Jervis, Knight, Her Majesty's Chief Justice assigned to hold pleas in Her Majesty's Court of the Bench," or *in the Exchequer* "before the Right Honourable Sir Frederick Pollock, Knight, Chief Baron of Her Majesty's Court of Exchequer,"] come the parties within mentioned by their respective attorneys within mentioned, and a jury of the within county [or "city"] being summoned, also come, who, being sworn to try the matters in question between the said parties upon their oath, say that, [*&c. state the affirmative or negative of the issue as it is found for the plaintiff, and in the terms adopted in the pleading.*] [*If there be several issues joined and tried, then say "as to the first issue within joined upon their oath say that," (&c. state the affirmative or negative of the issue as found for plaintiff),* "and as to the second issue within joined, the jury aforesaid upon their oath say that," (*&c. so proceed to state the finding of the jury on all the issues.*)] [*Conclude with an assessment of the damages, thus :*] And they assess the damages of the plaintiff on occasion of the premises within complained of by him, over and above his costs of suit, to £ , and for those costs to 40s. Therefore, &c.

4.—**THE LIKE**, where the Cause is tried at the Assizes.

Afterwards, on the day of , A.D. , (*the commission day of the assizes*), at in the county [or "city"] of , before Sir knight, and Sir knight, Justices of our said Lady the Queen, assigned to take the assizes in and for the within county [or "city and county," or "town and county," *as the case may be*], come the parties within mentioned by their respective attorneys within mentioned; and a jury of the said county [or "city and county," or "town and county," *as the case may be*,] being summoned also come, who, being sworn to try the matters in question between the said parties, upon their oath say, that [*&c. state the negative or affirmative of the issue as it is found for the plaintiff, and in the terms adopted by the pleading.*] [*If there be several issues joined and tried, then say, "as to the first issue within joined upon their oath, say, that," (&c. state the affirmative or negative of the issue as it is found for the plaintiff),*

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"and as to the second issue within joined, the jury aforesaid, on their oath aforesaid, say, that" (*&c. so proceed to state the finding of the jury on all the issues.*)] [*Conclude with stating an assessment of the damages, thus:*] And they assess the damages of the plaintiff on occasion of the premises within complained of by him, over and above his costs of suit, to £ , and for those costs to 40s. Therefore, &c.

5.—FORM OF A JUDGMENT FOR PLAINTIFF on a Verdict in a Town Cause.

[*Copy the Nisi Prius record, and then proceed thus:*] Afterwards, on the day of in the year of our Lord , [*day of signing final judgment*] come the parties aforesaid, by their respective attorneys aforesaid [*or as the case may be, if they have not appeared by attorneys*], and the Right Honourable John Lord Campbell, Her Majesty's Chief Justice assigned to hold Pleas in the Court of our Lady the Queen before the Queen herself, [*or if in Common Pleas, "the Right Honourable Sir John Jervis, Knight, Her Majesty's Chief Justice assigned to hold Pleas in Her Majesty's Court of the Bench," or if the Exchequer, "the Right Honourable Sir Frederick Pollock, Knight, Chief Baron of Her Majesty's Court of Exchequer," or "the Honourable Sir , Knight, before whom the said issue was* (*or "issues were"*) tried in the absence of Her Majesty's Chief Justice, &c.,] *as the case may be,*] hath sent hither his record had before him in these words: Afterwards [*&c., copy the postea.*] Therefore it is considered that the plaintiff do recover against the defendant the said moneys by the jurors aforesaid in form aforesaid assessed [*or if the action be in debt and the jury do not assess the debt, but only the damages and forty shillings costs, then say "do recover against the defendant the said debt of £ , and the moneys by the jurors aforesaid in form aforesaid assessed"*]; and also £ for his costs of suit by the court here adjudged of increase to the plaintiff, which said moneys and costs [*or "debt, damages, and costs,"*] in the whole amount to £ .

[*In the margin of the roll, opposite the words "Therefore it is considered," write "Judgment signed the day of , A.D. , "stating the day of signing the judgment."*]

6.—THE LIKE, in a Cause tried at the Assizes.

[*Copy the Nisi Prius record, and then proceed thus:*] Afterwards, on the day of in the year of our Lord (*day of signing final judgment,*) come the parties aforesaid, by their respective attorneys aforesaid (*or, as the case may*

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be); and Sir , knight, and Sir , knight, Justices of our Lady the Queen assigned to take the assizes in and for the said county [or "city and county," &c., *as the case may be*], before whom the said issue was [or "issues were"] tried, have sent hither their record had before them in these words. Afterwards, [*&c. Conclude as directed in the preceding form.*]

7.—FORM OF AN ISSUE where it is directed to be tried by the Sheriff, &c.

[*Commence the issue as in the form No. 1. above prescribed. Then copy all the pleadings, and after the joinder of issue proceed as follows:*] And forasmuch as the sum sought to be recovered in this suit, and indorsed on the said writ of summons, does not exceed 20*l.*, hereupon on the day of , in the year (*teste of writ of trial*), pursuant to the statute in that case made and provided, the Sheriff [or "the Judge of , being a Court of Record for the recovery of debt in the said county," *as the case may be,*] is commanded that he summon twelve, &c., who neither, &c., who shall be sworn truly to try the issue [or "issues,"] above joined between the parties aforesaid, and that he proceed to try such issue [or issues] accordingly; and when the same shall have been tried that he make known to the Court here what shall have been done by virtue of the writ of our Lady the Queen to him in that behalf directed, with the finding of the jury thereon indorsed on the day of , &c.

8.—FORM OF A WRIT OF TRIAL before the Sheriff, &c.

Victoria, by the Grace of God of the united kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of , [or "to the Judge of , being a Court of Record for the recovery of debt in Our county of ," *as the case may be,*] greeting: Whereas *A.B.* in Our Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," *as the case may be*] at Westminster, on the (*date of first writ of summons*) day of in the year of our Lord impleaded *C.D.* in an action for [*&c. here recite the declaration in the past tense,*] and the plaintiff claimed \$: And whereas the defendant on the (*date of plea*) day of last, by his attorney, (*or, as the case may be,*) came into Our said Court, and said [*&c., here recite the pleas and pleadings to the joinder of issue:*] And whereas the sum sought to be recovered in the said action, and indorsed on the writ of summons therein, does not exceed 20*l.*; and it is fitting that the issue [or "issues"] joined as aforesaid should be tried before you the said Sheriff [or "Judge," *as the case may be*]: We therefore, pursuant to

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the statute in such case made and provided, command you that you do summon twelve free and lawful men of your county duly qualified according to law, who are in nowise akin to the plaintiff or to the defendant, who shall be sworn truly to try the said issue [or "issues"] joined between the parties aforesaid, and that you proceed to try such issue [or "issues"] accordingly; and when the same shall have been tried in manner aforesaid we command you that you make known to us [or in the *Common Pleas* "to Our Justices," or in the *Exchequer* "to the Barons of Our said Exchequer," as the case may be,] at Westminster, what shall have been done by virtue of this writ, with the finding of the jury hereon indorsed, on the day of next. Witness [name of the Chief Justice, or of the Chief Baron if the action is in the *Exchequer*] at Westminster, the day of in the year of our Lord .

9.—FORM OF INDORSEMENT on the Writ of Trial of the Verdict.

Afterwards, on the day of , in the year of our Lord [day of trial] before me, sheriff of the county of , [or "judge of the Court of "] came as well the within-named plaintiff as the within-named defendant, by their respective attorneys within-named, [or, as the case may be,] and the jurors of the jury by me duly summoned, as within commanded, also came, and being duly sworn to try the issue [or "issues"] within mentioned on their oath, said, that [&c. here state the finding of the jury as in a *postea* on a trial at *Nisi Prius*].

The answer to (a) S. S., sheriff.

10.—THE LIKE, in case a Nonsuit takes place.

[Proceed as in the above form, but after the words "duly sworn to try the issue within mentioned," proceed as follows:] and were ready to give their verdict in that behalf; but the plaintiff being solemnly called, came not, nor did he further prosecute his said suit against the defendant.

11.—FORM OF JUDGMENT for the Plaintiff after Trial before the Sheriff.

[Copy the issue, and then proceed as follows:] Afterwards on the day of in the year of our Lord [day of signing final judgment], come the parties aforesaid, by their respective attorneys aforesaid [as the case may be], and the said sheriff, [or "judge," as the case may be], before whom the said issue [or "issues"] came on to be tried, hath sent hither the said last-mentioned writ, with an indorsement thereon, which said indorsement is in these words; to wit, [copy the indorsement]. Therefore it is considered, &c. [conclude as in other cases. See the form *supra*, No. 5.]

(a) Sic.

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Writs of Execution.

No. 1.—WRIT OF FIERI FACIAS on a Judgment for Plaintiff.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. We command you, that [*If sued out of the Court of Exchequer, say* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"] of the goods and chattels of *C.D.* in your bailiwick you cause to be made *£* [*the amount of all the moneys recovered by the judgment*] which *A.B.* lately in our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be,*] recovered against him, whereof the said *C.D.* is convicted, together with interest upon the said sum at the rate of four pounds per centum per annum from the day of in the year of our Lord

(a) The day on which the judgment was entered up, or if entered up prior to the 1st of October 1838, say "from the 1st day of October in the year of our Lord 1838," omitting the words "on which day the judgment afore-said was entered up."

(*) on which day the judgment aforesaid was entered up, and have that money, with such interest as aforesaid, before Us [*or in the Common Pleas "before us Justices," or in the Exchequer "before the Barons of our Exchequer," as the case may be,*] at Westminster immediately after the execution hereof, to be rendered to the said *A.B.*; and that you do all such things as by the Statute passed in the second year of Our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this Our Writ make appear to Us [*or in the Common Pleas "to our Justices," or in the Exchequer "to the Barons of Our Exchequer, as the case may be,*] at Westminster immediately after the execution hereof, and have you there then this Writ. Witness, at Westminster, the day of in the year of our Lord

No. 2.—WRIT OF FIERI FACIAS on a Judgment for Defendant.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. We command you, that you cause to be made [*If sued out of the Court of Exchequer "that you omit not by reason of any liberty of your county, but that you enter the same, and cause to be made"*] of the goods and chattels in your bailiwick of *A.B.* *£*, which lately in Our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be,*] were awarded to *C.D.*, for his costs of defence in an action lately prosecuted in Our said Court by the said *A.B.* against the said *C.D.*, whereof the said *A.B.* is convicted, together with interest on

the said sum at the rate of four pounds per centum per annum from
the day of in the year of our Lord

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(a), on which day the judgment aforesaid was entered up, and have you that money before Us [or in the Common Pleas "before Our Justices," or in the Exchequer "before Our Barons," as the case may be,] at Westminster, immediately after the execution hereof, to be rendered to the said C.D.; and that you do all such things as by the Statute passed in the second year of Our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this Our Writ make appear to Us [or in the Common Pleas "to Our Justices," or in the Exchequer "to the Barons of Our Exchequer," as the case may be,] at Westminster, immediately after the execution hereof, and have you there then this Writ. Witness at Westminster, the day of in the year of our Lord

(a) The day on which the judgment was entered up, or if entered up prior to the 1st of October 1838, say "from the 1st day of October in the year of our Lord 1838," omitting the words "on which day the judgment aforesaid was entered up."

No. 3.—WRIT OF FIERI FACIAS on a Rule for Payment of Money.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. We command you, that [If sued out of the Court of Exchequer, say, "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"] of the goods and chattels of C.D. in your bailiwick you cause to be made £ which lately in our Court of Queen's Bench, or "Common Pleas," or "Exchequer of Pleas," as the case may be,] by a rule of Our said Court dated the day of A.D.

were ordered to be paid by the said C.D. to A.B.; and that of the said goods and chattels of the said C.D. in your bailiwick you further cause to be made interest upon the said sum at the rate of four pounds per centum per annum from the day of in the year of our Lord

(b), on which day the said rule was made, and have that money together with such interest as aforesaid, before Us [or in the Common Pleas "before Our Justices," or in the Exchequer "before the Barons of Our Exchequer," as the case may be,] at Westminster, immediately after the execution hereof, to be rendered to the said A.B.; and that you do all such things as by the Statute passed in the second year of Our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this Our Writ make appear to Us [or in the Common Pleas "to our Justices," or in the Exchequer "to the Barons of Our Exchequer," as the case may be,] at Westminster, immediately after the

(b) The day on which the rule was made, or if it were made prior to the 1st of October 1838, say "from the 1st day of October in the year of our Lord 1838," omitting the words "on which day the said rule was made."

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execution hereof, and have you there then this Writ. Witness,
at Westminster, the day of
in the year of our Lord .

No. 4.—WRIT OF FIERI FACIAS on a Rule for Payment of Money and Costs.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. We command you, that [*If sued out of the Court of Exchequer, say* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"] of the goods and chattels of *C.D.* in your bailiwick you cause to be made £ which lately in Our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be,*] by a rule of Our said Court dated the day of in the year of our Lord were ordered to be paid by the said *C. D.* to *A. B.* together with certain costs in the said rule mentioned, which said costs have been taxed and allowed by Our said Court at £ ; and that of the said goods and chattels of the said *C. D.* in your bailiwick you further cause to be made interest upon the said two several sums at the rate of four pounds per centum per annum from the

(a) The day on which the costs were taxed. If the costs were taxed after the rule made, and you seek to recover interest on the principal money from the date of the latter, you must alter the form accordingly.

day of in the year of our Lord (a), and have those moneys, together with such interest as aforesaid, before Us [*or in the Common Pleas "before Our Justices," or in the Exchequer "before the Barons of Our Exchequer," as the case may be,*] at Westminster, immediately after the execution hereof, to be rendered to the said *A. B.*; and that you do all such things as by the Statute passed in the second year of Our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this Our Writ make appear to Us [*or in the Common Pleas "to Our Justices," or in the Exchequer "to the Barons of our Exchequer," as the case may be,*] at Westminster immediately after the execution hereof, and have you there then this Writ. Witness, at Westminster, the day of in the year of our Lord .

No. 5.—WRIT OF FIERI FACIAS on a Rule for Payment of Costs only.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. We command you, that [*If sued out of the Exchequer, say* "We command you, that you omit not by reason "of any liberty of your county, but that you enter the same, and"]

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of the goods and chattels of *C. D.* in your bailiwick you cause to be made £ for certain costs which by a rule of Our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be,*] dated the day of

in the year of our Lord were ordered to be paid by the said *C. D.* to *A. B.*, which said costs have been taxed and allowed by Our said Court at the said sum, and that of the said goods and chattels of the said *C. D.* in your bailiwick you further cause to be made interest upon the said sum at the rate of four pounds per centum per annum from the day of in the year of our Lord

(a) and have that money, together with such interest as aforesaid, before Us [*or in the Common Pleas "before Our Justices," or in the Exchequer "before the Barons of Our Exchequer," as the case may be,*] at Westminster, immediately after the execution hereof, to be rendered to the said *A. B.*; and that you do all such things as by the Statute passed in the second year of Our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this our Writ make appear to Us [*or in the Common Pleas "to Our Justices," or in the Exchequer "to the Barons of Our Exchequer," as the case may be,*] at Westminster immediately after the execution hereof, and have you there then this Writ. Witness, at Westminster, the day of in the year of our Lord

(a) The day on which the costs were taxed, or if there has been more than one allocatur, the day on which the last allocatur was made.

NO. 6.—WRIT OF FIERI FACIAS on a Judgment of an Inferior Court removed into One of the Superior Courts.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. We command you, that [*If sued out of the Court of Exchequer, say "We command you, that you omit not, by reason of any liberty of your county, but that you enter the same, and"*] of the goods and chattels of *C. D.* in your bailiwick you cause to be made £ which *A. B.* lately in [*insert the style of the Court*], by the judgment of the said Court, recovered against the said *C. D.*, whereof the said *C. D.* is convicted, and which judgment was afterwards, on the day of in the year of our Lord removed into Our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be,*] by virtue of an order of that Our said Court [*or "of one of the Justices of that Our said Court," as the case may be,*] in pursuance of the Statute in such case made and provided, and the costs attendant upon the application for the said order and upon the said removal were, on

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the day of in the year of our Lord
 , taxed and allowed by Our said Court of Queen's
 Bench [or "Common Pleas," or "Exchequer of Pleas," *as the case
 may be,*] at £ ; and we further command you, that
 of the said goods and chattels of the said *C. D.* in your bailiwick
 you further cause to be made the said £ (a), together
 with interest on the said two several sums at the rate of four pounds
 per centum per annum from the said day of
 in the year of our Lord (b); and that you
 have that money, with such interest as aforesaid, before Us [or in
 the *Common Pleas* "before Our Justices," or in the *Exchequer*
 "before the Barons of Our Exchequer," *as the case may be,*] at
 Westminster, immediately after the execution hereof, to be rendered
 to the said *A. B.*; and that you do all such things as by the Statute
 passed in the second year of Our reign you are authorized and
 required to do in this behalf. And in what manner you shall have
 executed this Our Writ make appear to Us [or in the *Common Pleas*
 "to Our Justices," or in the *Exchequer* "to the Barons of our
 Exchequer," *as the case may be,*] at Westminster immediately after
 the execution hereof, and have you there then this Writ. Witness
 at Westminster, the day of
 in the year of our Lord .

(a) The costs
 attendant
 upon the
 removal of
 the judgment
 out of the In-
 ferior Court
 into the Su-
 perior Court.

(b) The day
 on which the
 costs of re-
 moval were
 taxed.

No. 7.—WRIT of FIERI FACIAS on a Rule or Order for Payment of
 Money made in an Inferior Court, and removed into one
 of the Superior Courts.

VICTORIA, by the Grace of God of the United Kingdom of Great
 Britain and Ireland Queen, Defender of the Faith. We command
 you that [*If sued out of the Court of Exchequer, say* "We command
 you, that you omit not by reason of any liberty of your county,
 but that you enter the same, and"] of the goods and chattels of
C. D. in your bailiwick you cause to be made £ , which
 lately in [insert the style of the Court], by a rule [or
 "order"] of the said Court, entitled, [as the case may
 be], were by the said Court ordered to be paid by the said *C. D.* to
A. B.; and which rule [or "order"] was afterwards, on the
 day of in the year of our Lord , removed
 into Our Court of Queen's Bench [or "Common Pleas," or "Ex-
 chequer of Pleas," *as the case may be,*] by virtue of an order of
 that Our said Court, [or "of , one of the Justices of that
 Our said Court," *as the case may be,*] in pursuance of the Statute
 in that case made and provided, and the costs and charges attendant
 upon the application for the said last-mentioned order and upon the
 said removal were, on the day of in the
 year of our Lord , taxed and allowed by Our said

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Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," *as the case may be*,] at £ ; and we further

command you, that of the said goods and chattels of the said *C. D.* in your bailiwick you further cause to be made the said £

(a), together with interest on the said two several sums at the rate of four pounds per centum per annum from the said day of

(b), and that you have those moneys, with such interest as aforesaid, before Us [or in the *Common Pleas* "before Our Justices," or in the *Exchequer* "before the Barons of our Exchequer," *as the case may be*,] at Westminster immediately after the execution hereof, to be rendered to the said *A. B.*; and that you do all such things as by the Statute passed in the second year of Our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this Our Writ make appear to us [or in the *Common Pleas* "to Our Justices" or in the *Exchequer* "to the Barons of Our Exchequer," *as the case may be*,] at Westminster immediately after the execution hereof, and have you there then this Writ. Witness

day of

at Westminster, the

Lord

in the year of our

(a) The costs of removing the rule of the Inferior Court into the Superior Court.

(b) The day on which the costs of removing the rule of the Inferior Court into the Superior Court were taxed.

No. 8.—WRIT OF FIERI FACIAS on a Rule or Order for Payment of Money and Costs made in an Inferior Court, and removed into one of the Superior Courts.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. We command you, that [or, if sued out of the Court of Exchequer, say, "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"] of the goods and chattels of *C. D.* in your bailiwick you cause to be made £ , which lately in

[insert the style of the Court], by a rule [or "order"] of the said Court, entitled, [as the case may be], were by the said

Court ordered to be paid by the said *C. D.* to *A. B.*, and also £ for the costs of the said rule [or "order"] by the

said Court also ordered to be paid by the said *C. D.* to the said *A. B.*; which said rule [or "order"] was afterwards, on the

day of

in the year of our Lord

, removed into Our Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," *as the case may be*,] by an order of that Our said Court [or "of one of the Justices of that Our Court," *as the case may be*,] in pursuance of the Statute in such case made and provided; and the costs and charges attendant upon the application for the said last-mentioned order and upon the said removal were, on the day of in the year of

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our Lord , taxed and allowed by Our said Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be,*] at £ ; and We further command you, that of the said goods and chattels of the said *C. D.* in your bailiwick you further cause to be made the said £

(a) The costs of removing the rule from the Inferior Court into the Superior Court.

(a), together with the interest on the said three several sums at the rate of four pounds per centum per annum from the said day of in the year of our Lord

(b) The day on which the costs of removing the rule from the Inferior Court into the Superior Court were taxed.

(b), and that you have those moneys, with such interest as aforesaid, before Us [*or in the Common Pleas "before Our Justices," or in the Exchequer "before the Barons of Our Exchequer," as the case may be,*] at Westminster immediately after the execution hereof, to be rendered to the said *A. B.*; and that you do all such things as by the Statute passed in the second year of Our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this Our writ make appear to Us [*or in the Common Pleas "to Our Justices," or in the Exchequer "to the Barons of Our Exchequer," as the case may be,*] at Westminster immediately after the execution hereof, and have you there then this Writ. Witness at Westminster, the day of in the year of our Lord .

No. 9.—WRIT OF *ELIGIT* on a Judgment for Plaintiff.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. Whereas *A. B.*, lately in Our Court of Queen's Bench, [*or "Common Pleas," or "Exchequer of Pleas," as the case may be,*] by the judgment of the same Court recovered against *C. D.* £ [*the amount of all the moneys recovered by the judgment*], whereof the said *C. D.* is convicted, and afterwards the said *A. B.* came into Our said Court, and, according to the form of the Statutes in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C. D.* or any person in trust for him was seised or possessed of on the day of

(c) The day on which the judgment was entered up.

in the year of our Lord (c), on which day the judgment aforesaid was entered up, or at any time afterwards, or over which the said *C. D.* on that day, or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments

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respectively, according to the nature and tenure thereof, to him and to his assigns, according to the form of the said Statutes, until the said sum, together with interest thereon at the rate of four pounds per centum per annum from the day of

in the year of our Lord

(a) shall have been levied.

Therefore we command you that, [*If sued out of the Court of Exchequer, say* "Therefore We command you, that you omit not, by reason of any liberty of your county, but that you enter the same, and"] without delay, you cause to be delivered to the said

A. B. by a reasonable price and extent all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C. D.*, or any person in trust for him, was seized or possessed of on the said

day of

(b), or at any time afterwards,

or over which the said *C. D.* on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said *A. B.* as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said £

, together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this Our Writ make appear to Us [*or in the Common Pleas* "to Our Justices," *or in the Exchequer* "to the Barons of Our Exchequer," *as the case may be,*] at Westminster immediately after the execution hereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisalment, and have you there then this Writ. Witness

at Westminster, the

day of

in the year of our Lord

(a) The day on which the judgment was entered up, or in case the judgment was entered up prior to the 1st of October 1838, say "from the 1st day of October in the year of our Lord 1838."

(b) The day on which the judgment was entered up.

NO. 10.—WRIT OF ELEGIT on a Rule for Payment of Money.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. Whereas lately in our Court of Queen's Bench,

[*or "Common Pleas," or "Exchequer of Pleas," as the case may be,*]

by a rule of the said Court, dated the day of in the year of our Lord the sum of £ was ordered to be

paid by *C. D.* to *A. B.*, and afterwards the said *A. B.* came into Our said Court, and, according to the form of the Statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories,

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- tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C.D.*, or any person in trust for him, was seised or possessed of on the day of in the year of our Lord (a), on which day the said rule was made, or at any time afterwards, or over which the said *C.D.* on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum, together with interest upon the same at the rate of four pounds per centum per annum from the said day of in the year of our Lord (b), shall have been levied.
- (a) The day on which the rule was made. Therefore We command you that, [*If sued out of the Court of Exchequer, say* "Therefore We command you, that you omit not, by reason of any liberty of your county, but that you enter the same, and"] without delay, you cause to be delivered to the said *A.B.*, by a reasonable price and extent, all the goods and chattels of the said *C.D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C.D.*, or any person in trust for him, was seised or possessed of on the said day of (c), or at any time afterwards, or over which the said *C.D.* on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said *A.B.* as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said £ , together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this Our Writ make appear to Us [*or in the Common Pleas "to Our Justices," or in the Exchequer "to the Barons of Our Exchequer," as the case may be*], at Westminster immediately after the execution hereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this Writ. Witness at Westminster, the day of in the year of our Lord .
- (b) The day on which the rule was made.
- (c) The day on which the rule was made.

No. 11.—WRIT OF *ELIGIT* on a Rule for Payment of Money and Costs.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. Whereas lately in Our Court of Queen's Bench

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[or "Common Pleas," or "Exchequer of Pleas," as the case may be], by a rule of the said Court, dated the day of in the year of our Lord the sum of £ was ordered to be paid by *C.D.* to *A.B.*, together with certain costs in the said rule mentioned, which said costs were afterwards, on the day of in the year of our Lord taxed and allowed by Our said Court at £ ; and afterwards the said *A.B.* came into Our said Court, and, according to the form of the Statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C.D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C.D.*, or any one in trust for him, was seised or possessed of on the day of in the year of our Lord

(a), or at any time afterwards, or over which the said *C.D.* on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums, together with interest upon the same at the rate of four pounds per centum per annum from the said day of in the year of our Lord (a) The day on which the costs of the rule were taxed.

have been levied. Therefore We command you, that, [*If sued out of the Court of Exchequer, say* "Therefore We command you, that you omit not, by reason of any liberty of your county, but that you enter the same, and"] without delay, you cause to be delivered to the said *A.B.*, by a reasonable price and extent, all the goods and chattels of the said *C.D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C.D.*, or any person in trust for him, was seised or possessed of on the said day of in the year of our Lord (b) The day on which the costs of the rule were taxed.

(c), or at any time afterwards, or over which the said *C.D.* on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said *A.B.* as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ , together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this Our Writ (c) The day on which the costs of the rule were taxed.

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make appear to Us [*or in the Common Pleas* "to Our Justices," *or in the Exchequer* "to the Barons of Our Exchequer," *as the case may be,*] at Westminster immediately after the execution hereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this Writ. Witness at Westminster, the day of in the year of our Lord

No. 12.—Writ of *ELIGIT* on a Judgment of an Inferior Court, removed into one of the Superior Courts.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. Whereas *A. B.* lately in [*insert the style of the Court*], by the Judgment of the said Court recovered against *C. D.* £ , whereof the said *C. D.* is convicted: And whereas the said Judgment was afterwards, on the day of in the year of Our Lord removed into Our Court of Queen's Bench, [*or "Common Pleas," or "Exchequer of Pleas," as the case may be,*] by virtue of an order of that Our said Court [*or "of* , one of the Justices of that Our said Court," *as the case may be,*] in pursuance of the Statute in that case made and provided, and the costs and charges attendant upon the application for the said order and upon the said removal were afterwards, on the day of in the year of our Lord , taxed and allowed by Our said Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be,*] at £ ; and afterwards the said *A. B.* came into that Our said Court [*or "Common Pleas," or "Exchequer of Pleas," as the case may be,*] and, according to the form of the Statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C. D.*, or any person in trust for him, was seised or possessed of on the said day of in the year of our Lord aforesaid (a), or at any time afterwards, or over which the said *C. D.* on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums, together with interest upon the same at the rate of four pounds per centum per annum from the said

(a) The day on which the costs of removing the judgment were taxed.

day of _____ in the year of our Lord
 (a), shall have been levied. Therefore We command you, that,
 [If sued out of the Court of Exchequer, say "Therefore we com-
 mand you, that you omit not by reason of any liberty of your county,
 but that you enter the same, and"] without delay, you cause to be
 delivered to the said *A. B.*, by a reasonable price and extent, all the
 goods and chattels of the said *C. D.* in your bailiwick, except his
 oxen and beasts of the plough, and also all such lands, tenements,
 rectories, tithes, rents, and hereditaments, including lands and here-
 ditaments of copyhold or customary tenure, in your bailiwick, as the
 said *C. D.*, or any one in trust for him, was seised or possessed of on
 the said _____ day of _____ (a), or at any time
 afterwards, or over which the said *C. D.* on that day, or at any time
 afterwards, had any disposing power, which he might, without the
 assent of any other person, exercise for his own benefit, to hold the
 said goods and chattels to the said *A. B.* as his proper goods and
 chattels, and also to hold the said lands, tenements, rectories, tithes,
 rents, and hereditaments respectively, according to the nature and
 tenure thereof, to him and to his assigns, until the said two several
 sums of £ _____ and £ _____, together with interest
 as aforesaid, shall have been levied. And in what manner you shall
 have executed this Our Writ make appear to Us [*or in the Common
 Pleas "to Our Justices," or in the Exchequer "to the Barons of Our
 Exchequer," as the case may be,*] at Westminster immediately after
 the execution hereof, under your seal and the seals of those by whose
 oath you shall make the said extent and appraisement, and have you
 there then this Writ. Witness _____ at Westminster, the
 _____ day of _____ in the year of our Lord _____.

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(a) The day
 on which the
 costs of re-
 moving the
 judgment
 were taxed.

No. 13.—WRIT OF ELEGIT on a Rule or Order for Payment of
 Money made in an Inferior Court, and removed into One
 of the Superior Courts.

VICTORIA, by the Grace of God of the United Kingdom of Great
 Britain and Ireland Queen, Defender of the Faith; to the Sheriff
 of _____ greeting. Whereas lately in _____ [*insert the style of
 the Court*], by rule [*or order*"] of the said Court, entitled
 [*as the case may be*], the sum of £ _____ was by the said Court
 ordered to be paid by *C. D.* to *A. B.*: And whereas the said rule
 [*or "order"*] was afterwards, on the _____ day of _____ in the
 year of our Lord _____, removed into our Court of Queen's
 Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case
 may be,*] by virtue of an order of that Our said Court, [*or "of
 one of the Justices of that Our said Court," as the case may
 be,*] in pursuance of the Statute in that case made and provided,
 and the costs and charges attendant upon the application for the

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said last-mentioned order and upon the said removal were afterwards, on the day of in the year of our Lord , taxed and allowed by Our said Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," as the case may be], at £ , and afterwards the said *A.B.* came into that Our said Court, and, according to the form of the Statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C.D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C.D.*, or any person in trust for him, was seised or possessed of on the said day of in the year of our Lord

(a) The day on which the costs of removing the rule of the Inferior Court into the Superior Court were taxed.

(a), or at any time afterwards, or over which the said *C.D.* on the said day of (a), or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums, together with interest on the same at the rate of four pounds per centum per annum from the said day of (a), shall have been levied. Therefore We command you, that, [*If sued out of the Court of Exchequer, say* "Therefore we command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"] without delay, you cause to be delivered to the said *A.B.*, by a reasonable price and extent, all the goods and chattels of the said *C.D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C.D.*, or any one in trust for him, was seised or possessed of on the said day of (a), or at any time afterwards, or over which the said *C.D.* on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said *A.B.* as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said several sums of £ and £ , together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this Our Writ make appear to Us [*or in the Common Pleas* "to Our Justices," or *in the Exchequer* "to the Barons of Our Exchequer," as the case may be,] at Westminster immediately after the execution

hereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this Writ. Witness at Westminster, the day of in the year of our Lord

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No. 14.—Writ of *ELIGIT* on a Rule or Order for Payment of Money and Costs made in an Inferior Court, and removed into one of the Superior Courts.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. Whereas lately in [insert the style of the Court], by a rule [or "order"] of the said Court, entitled, [as the case may be], the sum of £ was by the said Court ordered to be paid by C.D. to A.B., together with the costs of the said rule [or "order"], which said costs were afterwards, on the day of in the year of our Lord, taxed and allowed by the said Court at £: And whereas the said rule [or "order"] was afterwards, on the day of in the year of our Lord, removed into Our Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," as the case may be,] by virtue of an order of that Our said Court, [or "of one of the Justices of that Our said Court," as the case may be,] in pursuance of the Statute in that case made and provided, and the costs and charges attendant upon the application for the said last-mentioned order, and upon the said removal, were afterwards, on the day of in the year of our Lord, taxed and allowed by Our said Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," as the case may be,] at £; and afterwards the said A.B. came into Our said Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," as the case may be,] and, according to the form of the Statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C.D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C.D. or any person in trust for him was seised or possessed of on the said day of (a), or at any time afterwards, or over which the said C.D. on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said three several sums, together with interest upon the same at the rate of four pounds per centum per annum

(a) The day on which the costs of removing the rule of the Inferior Court into the Superior Court were taxed.

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(a) The day on which the costs of removing the rule of the Inferior Court into the Superior Court were taxed.

from the said day of (a), shall have been levied. Therefore We command you, that, [*If sued out of the Court of Exchequer, say* "Therefore We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"] without delay you cause to be delivered to the said *A.B.*, by a reasonable price and extent, all the goods and chattels of the said *C.D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C.D.*, or any person in trust for him, was seised or possessed of on the said day of (a), or at any time afterwards, or over which the said *C.D.* on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said *A.B.* as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said three several sums of £ , and £ , and £ , together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this Our Writ make appear to Us [*or in the Common Pleas* "to Our Justices," *or in the Exchequer* "to the Barons of Our Exchequer," *as the case may be,*] at Westminster immediately after the execution hereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this Writ. Witness at Westminster, the day of in the year of our Lord .

No. 15.—WRIT OF CAPIAS AD SATISFACIENDUM on a Judgment for Plaintiff.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. We command you, that you [*If sued out of the Court of Exchequer, say* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"] take *C.D.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before Us [*or in the Common Pleas* "before Our Justices," *or in the Exchequer* "before the Barons of Our Exchequer," *as the case may be,*] at Westminster immediately after the execution hereof, to satisfy *A.B.* £ [the amount of all the moneys recovered by the judgment] which the said *A.B.* lately in Our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be,*] recovered against the said *C.D.*, whereof the said *C.D.* is convicted, together with interest upon the said sum, at the rate

of four pounds per centum per annum, from the day of
 , in the year of our Lord (a), on which day
the judgment aforesaid was entered up, and have you there then
this writ. Witness at Westminster, the day of
 , in the year of our Lord .

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No. 16.—WRIT OF CAPIAS AD SATISFACIENDUM on a Judgment for Defendant.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of _____ greeting. We command you, that you take [*If sued out of the Court of Exchequer, say* "that you omit not by reason of any liberty of your county, but that you enter the same and take"] *A.B.* if he shall be found in your bailiwick, and him safely keep, so that you may have his body before Us [*or in the Common Pleas* "before our Justices," *or in the Exchequer* "before the Barons of our Exchequer," *as the case may be,*] at Westminster, immediately after the execution hereof, to satisfy *C.D.* £ _____ which lately in Our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be,*] were awarded to the said *C.D.*, for his costs of defence in an action lately prosecuted in our said Court by the said *A.B.* against the said *C.D.*, whereof the said *A.B.* is convicted, together with interest upon the said sum at the rate of four pounds per centum per annum from the _____ day of _____ in the year of our Lord _____ (b), on which day the judgment aforesaid was entered up, and have you there then this Writ. Witness _____ at Westminster, the _____ day of _____, in the year of our Lord _____.

(a) The day on which the judgment was entered up, or if entered up prior to the 1st of October 1838, say "from the 1st day of October in the year of our Lord 1838," omitting the words, "on which day the judgment aforesaid was entered up."

(b) The day on which the judgment was entered up, or if entered up prior to the 1st of October 1838, say "from the 1st day of October in the year of our Lord 1838," omitting the words, "on which day the judgment aforesaid was entered up."

No. 17.—WRIT OF CAPIAS AD SATISFACIENDUM on a Rule for Payment of Money.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of _____ greeting. We command you, that you take [*If sued out of the Court of Exchequer, say* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and take"] C.D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before Us [*or in Common Pleas "before Our Justices," or in Exchequer "before the Barons of Our Exchequer," as the case may be,*] at Westminster immediately after the execution hereof, to satisfy A.B. & _____, which lately in our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be,*] by a rule of Our said Court dated the _____ day of _____ in the year of our Lord _____, were ordered to be paid by the

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(a) The day on which the rule was made, or if it were made prior to the 1st of October 1838, say "from the 1st day of October in the year of our Lord 1838."

said *C.D.* to the said *A.B.*, and further to satisfy the said *A.B.* interest upon the said sum at the rate of four pounds per centum per annum from the day and year aforesaid (a), and have you there then this Writ. Witness at Westminster, the day of , in the year of our Lord

No. 18.—WRIT OF CAPIAS AD SATISFACIENDUM on a Rule for Payment of Money and Costs.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. We command you, that you take [*If sued out of the Court of Exchequer, say* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and take"] *C.D.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before Us [*or in the Common Pleas* "before Our Justices," *or in the Exchequer* "before the Barons of our Exchequer," *as the case may be,*] at Westminster immediately after the execution hereof, to satisfy *A.B.* £ , which lately in Our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be,*] by a rule of Our said Court dated the day of in the year of our Lord , were ordered to be paid by the said *C.D.* to the said *A.B.*, together with certain costs in the said rule mentioned, which said costs have been taxed and allowed by our said Court at £ [*the amount of the allocator or allocators, if more than one,*] and further to satisfy the said *C.D.* the said last-mentioned sum, together with interest upon the said two several sums at the rate of four pounds per centum per annum from the day of

(b) The day on which the costs of the rule were taxed. If interest be claimed on the principal money from the date of the rule, alter the form accordingly.

in the year of our Lord (b), on which day the said costs were taxed, and have you there then this Writ. Witness at Westminster, the day of in the year of our Lord

No. 19.—WRIT OF CAPIAS AD SATISFACIENDUM on a Rule for Payment of Costs only.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. We command you, that you take [*If sued out of the Court of Exchequer, say* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and take"] *C.D.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before Us [*or in Common Pleas* "before Our Justices," *or in Exchequer* "before the Barons of our Exchequer," *as the case may be,*] at Westminster immediately after the execution hereof, to satisfy *A.B.* £ for

certain costs, which by a rule of Our Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," as the case may be], dated the day of in the year of our Lord were ordered to be paid by the said *C.D.* to the said *A.B.*, which said costs have been taxed and allowed by Our said Court at the said sum, and further to satisfy the said *C.D.* interest upon the said sum at the rate of four pounds per centum per annum from the day of in the year of our Lord (*a*), and have you there then this Writ. Witness at Westminster, on the day of in the year of our Lord .

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(*a*) The day on which the costs of the rule were taxed, or if there have been several allocaturs, the day on which the last allocatur was made.

NO. 20.—WRIT OF CAPIAS AD SATISFACIENDUM on a Judgment in an Inferior Court, removed into one of the Superior Courts.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. We command you, that you take [*If sued out of the Court of Exchequer, say* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and take"] *C.D.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before Us [*or in the Common Pleas* "before Our Justices," *or in the Exchequer* "before the Barons of Our Exchequer," as the case may be,] at Westminster immediately after the execution hereof, to satisfy *A.B.* £ , which the said *A.B.* lately in [*insert the style of the Court*], by the judgment of the said Court recovered against the said *C.D.*, whereof the said *C.D.* is convicted; and which judgment was afterwards, on the day of in the year of our Lord removed into Our Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," as the case may be,] by virtue of an order of that Our said Court [or "of one of the Justices of that Our said Court," as the case may be], in pursuance of the Statute in such case made and provided, and the costs and charges attendant upon the application for the said order and upon the said removal were on the day of in the year of our Lord taxed and allowed by Our said Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," as the case may be] at £ and further to satisfy the said *A.B.* the said £ (*a*), together with interest upon the said two several sums at the rate of four pounds per centum per annum from the said day of in the year of our Lord (*b*), and have you there then this Writ. Witness at Westminster, the day of in the year of our Lord .

(*a*) The costs attendant upon the removal of the judgment out of the Inferior Court into the Superior Court.
(*b*) The day on which the costs of removal were taxed.

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No. 21.—WRIT OF CAPIAS AD SATISFACIENDUM on a Rule or Order of an Inferior Court for Payment of Money, removed into one of the Superior Courts.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. We command you, that you take [*If sued out of the Court of Exchequer, say* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and take"] *C.D.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before Us [*or in the Common Pleas* "before Our Justices," *or in the Exchequer* "before the Barons of our Exchequer," *as the case may be,*] at Westminster immediately after the execution hereof, to satisfy *A.B.* £ , which lately in [insert the style of the court], by a rule [*or* "order"] of the said Court, entitled [as the case may be], were ordered to be paid by the said *C.D.* to the said *A.B.*, and which rule [*or* "order"] was afterwards, on the day of in the year of our Lord , removed into Our Court of Queen's Bench, [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be,*] by an order of that Our said Court [*or* "of one of the Justices of that Our said Court," *as the case may be,*] in pursuance of the Statute in such case made and provided, and the costs and charges attendant upon the application for the said last-mentioned order and upon the said removal were on the day of in the year of our Lord taxed and allowed by Our said Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be,*] at £ and also to satisfy the said *A.B.* the said £ (a), together with interest on the said two several sums at the rate of four pounds per centum per annum from the said day of in the year of our Lord (b), and have you there then this Writ. Witness at Westminster, the day of in the year of our Lord .

(a) The costs of removing the rule of the Inferior Court into the Superior Court.
(b) The day on which the costs of removal were taxed.

No. 22.—WRIT OF CAPIAS AD SATISFACIENDUM, on a Rule or Order of an Inferior Court for Payment of Money and Costs, removed into one of the Superior Courts.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. We command you, that you take [*If sued out of the Court of Exchequer,* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and take"] *C. D.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before Us [*or in Common Pleas* "before Our Justices," *or in Exchequer* "before the Barons

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of Our Exchequer," *as the case may be*,] at Westminster immediately after the execution hereof, to satisfy *A. B.* £ , which lately in [*insert the style of the Court*], by a rule [*or "order"*] of the said Court, entitled, &c. [*as the case may be*], were by the said Court ordered to be paid by the said *C. D.* to the said *A. B.*, and also \$ for the costs of the said rule, by the said Court also ordered to be paid by the said *C. D.* to the said *A. B.*, which said rule [*or "order"*] was afterwards, on the day of in the year of our Lord , removed into Our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be,*] by an order of that Our said Court [*or "of one of the Justices of that Our said Court," as the case may be,*] in pursuance of the Statute in such case made and provided, and the costs and charges attendant upon the application for the said last-mentioned order and upon the said removal were on the day of in the year of our Lord , taxed and allowed by Our said Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] at \$, and also to satisfy the said *A. B.* the said \$ (a), together with interest on the said three several sums at the rate of four pounds per centum per annum from the day of in the year of our Lord (b), and have you there then this Writ. Witness at Westminster, the day of in the year of our Lord .

(a) The costs of removing the rule from the Inferior Court into the Superior Court.

No. 23.—WRIT OF HABERE FACIAS IN EJECTMENT upon a Judgment by Default.

[b] The day on which the costs of removing the rule from the Inferior Court were taxed.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. Whereas *A. B.* lately in Our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*], by the judgment of the same Court, recovered possession of

[*here describe the property as in the writ of ejectment, or if part only of the land has been recovered, describe such part as in the judgment*], with the appurtenances, in your bailiwick: Therefore We command you, that, [*If sued out of the Court of Exchequer, say "Therefore We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"*] without delay, you cause the said *A. B.* to have possession of the said land and premises with the appurtenances. And in what manner you have executed this Our Writ make appear to Us [*or in Common Pleas "to Our Justices," or in Exchequer "to the Barons of Our Exchequer," as the case may be,*] at Westminster immediately upon the execution hereof, and have you there then this Writ. Witness at Westminster, the day of in the year of our Lord .

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No. 24.—WRIT OF HABERE FACIAS and FIERI FACIAS for Costs upon a Judgment for Plaintiff in Ejectment where Defendant has appeared.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. Whereas *A. B.* lately in Our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be,*] recovered possession of [here describe the property as in the writ of ejectment, or if part only of the land has been recovered, describe such part as in the judgment], with the appurtenances, in your bailiwick, in an action of ejectment at the suit of the said *A. B.* against *C. D.*; Therefore We Command you, that, without delay, you cause the said *A. B.* to have possession of the said land and premises with the appurtenances; and We also command you, that [*If sued out of the Court of Exchequer, say "and We also command you, that you omit not by reason of any liberty of your county," but that you enter the same, and that"*] of the goods and chattels of the said *C. D.* in your bailiwick you cause to be made £ , which the said *A. B.* lately in Our said Court recovered against the said *C. D.* for the said *A. B.*'s costs of the said suit, whereof the said *C. D.* is convicted, together with interest upon the said sum at the rate of four pounds per centum per annum from the day of in the year of our Lord , on which day the judgment aforesaid was entered up, and have that money and interest aforesaid in Our said Court immediately after the execution hereof, to be rendered to the said *A. B.*; and that you do all things as by the Statute passed in the second year of Our reign you are authorized and required to do in that behalf. And in what manner you shall have executed this Our Writ make appear to Us [*or in the Common Pleas "before Our Justices," or in the Exchequer "before the Barons of Our Exchequer," as the case may be,*] at Westminster immediately after the execution hereof, and have you there then this Writ. Witness, at Westminster the day of in the year of our Lord .

No. 25.—WRIT OF FIERI FACIAS for Costs on a Judgment for Plaintiff in Ejectment where Defendant has appeared.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of greeting. We command you, that [*If sued out of the Court of Exchequer, "We command you, that you omit not by reason of any reason of any liberty of your county, but that you enter the same, and"*] of the goods and chattels of *C. D.* in your bailiwick you cause to be made £ which *A. B.* lately in Our Court of

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Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," as the case may be,] recovered against him, for the said *A.B.*'s costs of suit in an action of ejectment brought by the said *A.B.* against the the said *C.D.* in that Court, whereof the said *C.D.* is convicted, together with interest upon the said sum at the rate of four pounds per centum per annum from the day of in the year of our Lord , on which day the judgment aforesaid was entered up, and have that money, with such interest as aforesaid, before Us [or in the *Common Pleas* "before Our Justices," or in the *Exchequer* "before the Barons of Our Exchequer," as the case may be,] at Westminster immediately after the execution hereof, to be rendered to the said *A.B.*; and that you do all things as by the Statute passed in the second year of Our reign you are authorized and required to do in that behalf. And in what manner you shall have executed this Our Writ make appear to Us [or in the *Common Pleas* "to Our Justices," or in the *Exchequer* "to the Barons of Our Exchequer," as the case may be,] at Westminster immediately after the execution hereof, and have you there then this Writ. Witness at Westminster, the day of in the year of our Lord .

II.

RULES OF THE COURTS OF QUEEN'S BENCH, COMMON PLEAS, AND EXCHEQUER.

HILARY TERM, 1853.

1. EXAMINATION, ADMISSION, AND RE-ADMISSION OF ATTORNEYS.
2. REGULATIONS FOR CONDUCTING THE EXAMINATION.
3. TAKING OUT AND RENEWAL OF ATTORNEYS' CERTIFICATES.

1. Examination, Admission, and Re-admission of Attorneys.

WHEREAS by section 15 of the stat. 6 & 7 Vict. c. 73, it was enacted "That it shall be lawful for the Judges of the Courts of Queen's Bench, Common Pleas, and Exchequer, or any one or more of them, and he and they is and are hereby authorized and required, before he or they shall issue a fiat for the admission of any person to be an attorney, to examine and inquire by such ways and means as he or they shall think proper touching the articles and service, and the fitness and capacity, of such person to act as an attorney; and if the judge or judges as aforesaid shall be satisfied by such examination or by the certificate of such examiners as herein-after mentioned that such person is duly qualified and fit and competent to act as an attorney, then, and not otherwise, the said judge or judges shall, and he and they is and are hereby authorized and required to administer or cause to be administered to such person the oath herein-after directed to be taken by attorneys and solicitors in addition to the oath of allegiance, and after such oaths taken, to cause him to be admitted an attorney of such court;" and by section 16 of the said

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statute it was further enacted, for the purpose of facilitating the inquiry touching the due service under articles as aforesaid, and the fitness and capacity of any person to act as an attorney, "That it shall be lawful for the Judges of the Courts of Queen's Bench, Common Pleas, and Exchequer (or any eight or more of them, of whom the chiefs of the said Courts shall be three) from time to time to nominate and appoint such persons to be examiners for the purposes aforesaid, and to make such rules and regulations for conducting such examination as such Judges shall think proper:"

AND WHEREAS, in order to carry the said statute more fully into effect, it is expedient annually to appoint examiners, subject to the control of the Judges, in manner herein-after mentioned :

AND WHEREAS, pursuant to the said statute, certain rules, orders, and regulations were made by the Judges of the said Courts in Easter Term, 1846; and other rules, orders, and regulations of the said Courts, or one of them, have been from time to time previously made relating to the examination, admission, and re-admission of attorneys and their annual certificates :

AND WHEREAS it is expedient to consolidate and amend the said rules, orders, and regulations, in manner herein-after mentioned :

It is therefore Ordered, That from and after the first day of Trinity Term next, all rules, orders, and regulations relating to the examination, admission, and re-admission of attorneys, and the taking out and renewal of their annual certificates, be, and they are hereby annulled : Provided that all notices, appointments, and other steps and proceedings duly made, had, or taken, or to be had or taken under and by virtue of the rules, orders, or regulations, or any of them hereby to be annulled, shall be valid, and may be carried into effect, anything herein to the contrary notwithstanding ; and it is ordered, that the following rules, orders, and regulations shall, from and after the said first day of Trinity Term next, be substituted in lieu of all such former rules, orders, and regulations whatsoever :

I. The several Masters for the time being for the Courts of Queen's Bench, Common Pleas, and Exchequer respectively, together with sixteen attorneys or solicitors to be appointed by a rule of Court in every year to be examiners for one year, any five of whom (one whereof to be one of the said Masters) shall be competent to conduct the examination ; and that, subject to such appeal as herein-after mentioned, no person who shall not have been previously admitted a solicitor of the High Court of Chancery shall be admitted to be sworn an attorney of any of the Courts, except on production of a certificate signed by the major part of such examiners actually present at and conducting

his examination, testifying his fitness and capacity to act as an attorney, and in the usual business transacted by an attorney; such certificate to be in force only to the end of the term next but one following the date thereof, unless such time shall be specially extended by the order of a Judge.

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II. The examiners so to be appointed shall conduct the said examinations, under regulations to be first submitted to and approved by the Judges.

III. In case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty within one month to apply for admission by petition, in writing, to the Judges, to be delivered to the clerk of the Lord Chief Justice of the Court of Queen's Bench, upon which no fee or gratuity shall be received; which application shall be heard in Serjeant's Inn Hall by not less than three of the Judges.

IV. AND WHEREAS the hall or building of the Incorporated Law Society of the United Kingdom in Chancery Lane is a fit and convenient place for holding the said examinations, and the said Society have consented to allow the same to be used for that purpose:

It is Ordered, That until further order such examinations be there held on such days as the said examiners, or any five of them, shall appoint; and that any person not previously admitted an attorney of any of the three courts, and desirous of being admitted, shall give notice to the said examiners, before the commencement of the term next preceding that in which he shall propose to be examined, of his intention to apply for examination by leaving the same with the secretary of the said Society at their said hall; which notice shall also state his place or places of residence or service for the last preceding twelve months, and in case of application to be admitted on a refusal of the certificate shall give ten days' notice, to be served in like manner, of the day appointed for hearing the same.

V. Three days at the least before the commencement of the term next preceding that in which any person not before admitted shall propose to be admitted an attorney of either of the courts, he shall cause to be delivered at the Master's office a written notice, which shall state his place or places of abode or service for the last preceding twelve months, and the name and place of abode of the attorney or attorneys to whom he was articulated and assigned (if any such assignment has been made), and the Master shall reduce all such notices as in this rule first-mentioned into an alphabetical table or tables under convenient heads, and affix the same on the first day of term in some conspicuous place within or near to and on the outside of each court; and such person shall

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also for the space of one full term previous to the term in which he shall apply to be admitted, enter or cause to be entered in two books kept for that purpose, one at the chambers of the Lord Chief Justice or Chief Baron of the court in which he applies to be admitted, and the other at the chambers of the other Judges or Barons of such court, his name and place or places of abode; and also the name or names, and place or places of abode of the attorney or attorneys to whom he shall have been article'd and assigned (if any such assignment has been made).

VI. Every person so proposing to be admitted an attorney of either of the said courts, who shall have given such notices of his intention to apply for examination and admission as aforesaid, or as authorized by this rule, and who shall not have attended to be examined, or not have passed the examination, or not have been admitted, may within one week after the end of the term for which such notices were given, renew the notices for examination or admission for the then next ensuing term, and so from time to time as often as he shall think proper; and that all such renewed notices shall be added to the list of notices of admission, and re-admission, and placed up on the first day of the term in the said courts, chambers, and offices; and the applicants named in such renewed notices may be examined in the ordinary way in pursuance of such last-mentioned notices, but shall not be admitted until the last day of the term, unless otherwise ordered by one of the said courts, or a Judge thereof.

VII. On an application to re-admit an attorney who has been struck off the rolls, the applicant shall, before the commencement of the term next preceding that in which he intends to apply to be re-admitted, give notice thereof, as in the case of an original admission; and the affidavits in support of such application shall be filed at the office of the Master, and a copy thereof left at the chambers of the Lord Chief Justice of the Court of Queen's Bench before the term on the last day of which the notice for re-admission is intended to be made, and the rule for such re-admission shall be drawn up, on reading such affidavit, and an affidavit of such copy having been left, and notices given in compliance with this rule.

VIII. A printed copy of the list of the admissions and re-admissions shall be stuck up in the Queen's Bench, Common Pleas, and Exchequer offices, and at the Judges' hall or chambers of each court in Rolls-gardens.

2. Regulations approved by the Judges for the Examination of Persons applying to be admitted as Attorneys of the Courts of Queen's Bench, Common Pleas, or Exchequer.

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I. Every person applying to be admitted an attorney of any of the said courts pursuant to the said rules shall, within the first seven days of the term in which he is desirous of being admitted, leave or cause to be left with the secretary of the said Incorporated Law Society his articles of clerkship, duly stamped, and also any assignment which may have been made thereof, together with answers to the several questions hereunto annexed, signed by the applicant, and also by the attorney or attorneys, London agent, barrister, or special pleader, with whom he shall have served his clerkship.

II. In case the applicant shall show sufficient cause to the satisfaction of the examiners why the first regulation cannot be fully complied with, it shall be in the power of the said examiners, upon sufficient proof being given of the same, to dispense with any part of the first regulation that they may think fit and reasonable.

III. Every person applying for admission shall also, if required, sign and leave, or cause to be left, with the secretary of the said Society, answers in writing to such other written or printed questions as shall be proposed by the said examiners touching his said service and conduct, and shall also, if required, attend the said examiners personally for the purpose of giving further explanations touching the same; and shall also, if required, procure the attorney or attorneys with whom he shall have served his clerkship as aforesaid to answer, either personally or in writing, any questions touching such service or conduct, or shall make proof to the satisfaction of the said examiners of his inability to procure the same.

IV. Every person so applying shall also attend the said examiners at the hall of the said Society, at such time or times as shall be appointed for that purpose pursuant to the said rule, as the said examiners shall appoint, and shall answer such questions as the said examiners shall then and there put to him, by written or printed papers touching his fitness and capacity to act as an attorney, and in the usual business transacted by an attorney.

V. Upon compliance with the aforesaid regulations, and if the major part of the said examiners actually present at and conducting the said examination (one of them being one of the said Masters) shall be satisfied as to the fitness and capacity of the person so applying to act as an attorney, the said examiners so

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also for the space of one full term previous to the term in which he shall apply to be admitted, enter or cause to be entered in two books kept for that purpose, one at the chambers of the Lord Chief Justice or Chief Baron of the court in which he applies to be admitted, and the other at the chambers of the other Judges or Barons of such court, his name and place or places of abode; and also the name or names, and place or places of abode of the attorney or attorneys to whom he shall have been articulated and assigned (if any such assignment has been made).

VI. Every person so proposing to be admitted an attorney of either of the said courts, who shall have given such notices of his intention to apply for examination and admission as aforesaid, or as authorized by this rule, and who shall not have attended to be examined, or not have passed the examination, or not have been admitted, may within one week after the end of the term for which such notices were given, renew the notices for examination or admission for the then next ensuing term, and so from time to time as often as he shall think proper; and that all such renewed notices shall be added to the list of notices of admission, and re-admission, and placed up on the first day of the term in the said courts, chambers, and offices; and the applicants named in such renewed notices may be examined in the ordinary way in pursuance of such last-mentioned notices, but shall not be admitted until the last day of the term, unless otherwise ordered by one of the said courts, or a Judge thereof.

VII. On an application to re-admit an attorney who has been struck off the rolls, the applicant shall, before the commencement of the term next preceding that in which he intends to apply to be re-admitted, give notice thereof, as in the case of an original admission; and the affidavits in support of such application shall be filed at the office of the Master, and a copy thereof left at the chambers of the Lord Chief Justice of the Court of Queen's Bench before the term on the last day of which the notice for re-admission is intended to be made, and the rule for such re-admission shall be drawn up, on reading such affidavit, and an affidavit of such copy having been left, and notices given in compliance with this rule.

VIII. A printed copy of the list of the admissions and re-admissions shall be stuck up in the Queen's Bench, Common Pleas, and Exchequer offices, and at the Judges' hall or chambers of each court in Rolls-gardens.

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2. Regulations approved by the Judges for the Examination of Persons applying to be admitted as Attorneys of the Courts of Queen's Bench, Common Pleas, or Exchequer.

I. Every person applying to be admitted an attorney of any of the said courts pursuant to the said rules shall, within the first seven days of the term in which he is desirous of being admitted, leave or cause to be left with the secretary of the said Incorporated Law Society his articles of clerkship, duly stamped, and also any assignment which may have been made thereof, together with answers to the several questions hereunto annexed, signed by the applicant, and also by the attorney or attorneys, London agent, barrister, or special pleader, with whom he shall have served his clerkship.

II. In case the applicant shall show sufficient cause to the satisfaction of the examiners why the first regulation cannot be fully complied with, it shall be in the power of the said examiners, upon sufficient proof being given of the same, to dispense with any part of the first regulation that they may think fit and reasonable.

III. Every person applying for admission shall also, if required, sign and leave, or cause to be left, with the secretary of the said Society, answers in writing to such other written or printed questions as shall be proposed by the said examiners touching his said service and conduct, and shall also, if required, attend the said examiners personally for the purpose of giving further explanations touching the same; and shall also, if required, procure the attorney or attorneys with whom he shall have served his clerkship as aforesaid to answer, either personally or in writing, any questions touching such service or conduct, or shall make proof to the satisfaction of the said examiners of his inability to procure the same.

IV. Every person so applying shall also attend the said examiners at the hall of the said Society, at such time or times as shall be appointed for that purpose pursuant to the said rule, as the said examiners shall appoint, and shall answer such questions as the said examiners shall then and there put to him, by written or printed papers touching his fitness and capacity to act as an attorney, and in the usual business transacted by an attorney.

V. Upon compliance with the aforesaid regulations, and if the major part of the said examiners actually present at and conducting the said examination (one of them being one of the said Masters) shall be satisfied as to the fitness and capacity of the person so applying to act as an attorney, the said examiners so

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present, or the major part of them, shall certify the same under their hands in the following form, namely :—

“ In pursuance of the rules made in Hilary Term 1853 of the Courts of Queen’s Bench, Common Pleas, and Exchequer, we, being the major part of the examiners actually present at and conducting the examination of A.B. of, &c., do hereby certify that we have examined the said A.B. as required by the said rules, and we do testify that the said A.B. is fit and capable to act as an attorney of the said courts, and in the usual business transacted by attorneys.”

QUESTIONS as to due service of articles of clerkship, to be answered by the clerk.

1. What was your age at the date of your articles ?
2. Have you served the whole term of your articles at the office where the attorney or attorneys to whom you were articled or assigned carried on his or their business, and if not, state the reason ?
3. Have you at any time during the term of your articles been absent without the permission of the attorney or attorneys to whom you were articled or assigned, and if so, state the length and occasions of such absence ?
4. Have you, during the period of your articles, been engaged or concerned in any profession, business, or employment other than your professional employment as clerk to the attorney or attorneys to whom you were articled or assigned ?
5. Have you, since the expiration of your articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment other than the profession of an attorney or solicitor ?

QUESTIONS to be answered by the attorney, agent, barrister, or special pleader with whom the clerk may have served any part of the time under his articles.

1. Has A.B. served the whole time of his articles at the office where you carry on your business, and if not, state the reason ?
2. Has the said A.B. at any time during the term of his articles been absent without your permission, and if so, state the length and occasions of such absence ?
3. Has the said A.B., during the period of his articles, been engaged or concerned in any profession, business, or employment other than his professional employment as your articled clerk ?
4. Has the said A.B., during the whole term of his clerkship, with the exceptions above-mentioned, been faithfully and diligently employed in your professional business of an attorney or solicitor ?

6. Has the said A.B., since the expiration of his articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney or solicitor?

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And I do hereby certify that the said A.B. has duly and faithfully served under his articles of clerkship (or assignment, as the case may be), bearing date, &c. for the term therein expressed, and that he is a fit and proper person to be admitted an attorney.

3. Taking out and Renewal of Attorneys' Certificates.

WHEREAS by sect. 25 of the stat. 6 & 7 Vict. c. 73, it was enacted, that if any attorney shall neglect to procure an annual stamped certificate authorizing him to practise as such within the time by law appointed for that purpose, then and in such case the registrar of attorneys and solicitors shall not afterwards grant a certificate to such attorney without the order of one of the Courts of Queen's Bench, Common Pleas, or Exchequer, or of one of the Judges thereof to issue such Certificate :

AND WHEREAS it is expedient, that upon the application of an attorney having neglected for the space of one whole year to procure or to renew an annual stamped certificate, the Judges should have means of inquiring as to the circumstances under which he has omitted to commence, or has discontinued to practise, and as to his conduct and employment during the term of such omission or discontinuance :

It is ~~Ordered~~, that from and after the last day of Trinity Term next, every person who shall intend to apply on the last day of term, or in vacation, for such order, shall, three days at the least previous to the first day of the term on the last day of which the application is intended to be made, or in case the application is to be made in vacation, shall, previous to the first day of the preceding term, leave at the office of the Masters of the court in which he intends to make the application, a notice in writing, containing his name and place of abode for the last preceding twelve months ; and that before the said first day of term he shall enter or cause to be entered a like notice in two books kept for that purpose, one at the chambers of the Lord Chief Justice or Chief Baron, and the other at the chambers of the other Judges or Barons ; and shall before the said first day of term cause to be filed the affidavit upon which he seeks to obtain or renew his said certificate at the office of the Masters aforesaid, and a copy thereof to be also left at the chambers of the Lord Chief Justice of the Court of Queen's Bench.

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II. The Masters shall reduce such notices into alphabetical order, and add the same to the list of admissions and re-admissions; and the order for the granting the certificate shall be drawn up on reading such affidavit of such copy having been left in compliance with this rule.

III. Upon an application to dispense with the usual notice, and to take out or renew the certificate of an attorney as aforesaid, a summons shall be served on the Registrar of Attorneys, calling on him to show cause within ten days why such certificate should not be issued; and if no cause be shown to the satisfaction of the Judge, an order may be made for issuing such certificate, if the Judge shall think proper.

CAMPBELL.
JOHN JERVIS.
FRED. POLLOCK.
J. PARKE.
E. H. ALDERSON.
J. T. COLERIDGE.
C. CRESSWELL.
W. ERLE.
CHARLES CROMPTON.

Signed the 20th day of January,
A.D. 1853.

III.

DIRECTIONS TO THE MASTERS OF THE
COURTS.*(In lieu of Directions now in force.)*

1. Between the 1st day of September and the 24th day of October in 1853.
each year, one of the Masters of the Courts of Queen's Bench, Common January 27th.
Pleas, or Exchequer shall have authority to tax bills of costs, take
references, and perform other necessary and immediate matters arising
in or appertaining to any or either of the said Courts at the office of his
own Court; and for such purpose one of the Masters shall attend on
certain days in each week, as may be found necessary, and of which due
notice shall be affixed in the Judges chambers and in the respective offices
of the Masters of each Court; and such Master shall be considered as the
vacation Master.

2. In order to diminish as much as possible the costs arising from the
copying of documents to accompany the briefs of counsel, the Masters are
to allow only the copying of such documents, or such parts of documents,
as they may consider necessary for the instruction of counsel, or for use at
the trial.

3. No fee to counsel to be allowed on writs of trial, except on trials
before the Judge of the Sheriffs' Court of London, or of other Courts of
Record where attorneys are not allowed to practise, and then one guinea
only.

4. The Masters shall have discretion in all cases to allow as between
party and party the fees of counsel or special pleader for drawing pleadings
or other proceedings, whether special or otherwise, and advising.

5. When judgment is signed on a cognovit, or on a Judge's order
authorizing the plaintiff to sign judgment, no declaration to ground judg-
ment shall be necessary or allowed on the taxation of costs.

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6. The costs of attendance by counsel or special pleader before a Judge at chambers shall in no case be allowed as between party and party, unless the Judge shall certify for such allowance.

7. In all actions on contract, other than cases wherein by reason of the nature of the action no writ of trial can by law be issued, where the sum recovered or paid into Court, and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed twenty pounds (without costs), the plaintiff's costs as against the defendant shall be taxed according to the lower scale of allowances in the Schedule of Costs hereunto annexed. Provided, that in case of trial before a Judge of one of the superior Courts, or Judge of assize, if the Judge shall certify on the *postea* that the cause was proper to be tried before him, and not before a Sheriff or Judge of an inferior Court, the costs shall be taxed on the higher scale.

8. Where in like actions the sum endorsed on the summons shall be more than twenty pounds, but the plaintiff fails to recover more than that sum, and the Judge does not certify as aforesaid, the plaintiff's costs against the defendant, whether between party and party or as between attorney and client, shall be taxed as upon a writ of trial before a Judge of a Court of Record where attorneys are not allowed to act as advocates, as herein-after provided for, but the defendant's costs, if any, are to be taxed upon the higher scale; provided, that in cases triable before the Sheriff or Judge of an inferior Court, where the Judge shall refuse to make an order for such trial, the Judge may, if he shall think fit, direct at the time of such refusal on what scale the costs of each party shall be taxed, and in default of such direction the costs of both parties shall be taxed on the higher scale.

9. At the head of every bill of costs taken to the taxing officer to be taxed, it shall be stated whether the sum recovered, accepted, or agreed to be paid exceeds the sum of twenty pounds, or not, in the following form:

Debt above twenty pounds.

Debt twenty pounds or under.

1853.

General Allowance for Plaintiffs and Defendants; and
in Cases under 20*l.* as well between Attorney and
Client as between Party and Party.

WRITS.

	Above 20 <i>l.</i>			Under 20 <i>l.</i>		
	£	s.	d.	£	s.	d.
Summons	0	12	6	0	10	0
Concurrent summons	0	10	0	0	7	6
Renewed summons	0	10	0	0	7	6
Capias	0	12	6	—	—	—
Alias	0	10	0	—	—	—
Pluries	0	10	0	—	—	—
Capias ad satisfaciendum	0	12	0	0	11	0
Renewed ca. sa.	0	9	6	0	8	6
Ca. sa. for the residue	0	14	0	0	13	0
Renewed	0	11	6	0	10	6
Fieri facias	0	12	0	0	11	0
Renewed	0	9	6	0	8	6
Renewed for the residue	0	14	0	0	13	0
Renewed	0	11	6	0	10	6
Fi. fa. de bonis ecclesiasticis	0	14	6	—	—	—
Renewed	0	12	0	—	—	—
Habere facias pos. and fi. fa. or ca. sa. for costs in one writ	0	18	0	—	—	—
Habere fa. pos. alone	0	15	0	—	—	—
Special indorsements on writs of sum- mons	0	5	0	0	2	6
Writ of revivor	0	12	6	0	10	0
Ejectment	0	15	0	—	—	—
Of trial, exclusive of fee	—	—	—	0	8	0
Subpoena ad test.	0	7	0	0	5	0
Subpoena duces tecum	0	9	0	0	7	0
If above four folios, additional per folio	0	0	8	0	0	4
Exigi facias	1	1	0	—	—	—
Capias ultagatum	1	1	0	—	—	—
Elegit, Nos. 9, 10, and 11. in New Rules	0	15	0	—	—	—
Ditto, Nos. 12, 13, and 14	1	0	0	—	—	—
Attachment	0	12	0	—	—	—
Detainer	0	12	6	—	—	—
Habeas corpus obtained by plaintiff, in- cluding allowance	1	0	0	—	—	—
Procedendo	0	15	0	—	—	—
Venditioni exponas	0	13	6	—	—	—
Supersedeas, if not issued by a prisoner	0	11	0	—	—	—

COPY AND SERVICE OF WRITS.

Of summons, the defendant being served in London, Middlesex, or Surrey, within two miles of the place of business of the attorney, for each defendant	0	5	0	0	5	0
If beyond that distance, additional for every mile, but in cases under 20 <i>l.</i> not to exceed 10 miles	0	1	0	0	0	6

1853.

Above 20l. Under 20l.
£ s. d. £ s. d.

If the defendant should be served in any other county, the same allowance, but the distance to be calculated from the office of the attorney employed to effect service.				
Of writ of revivor, the same as summons.				
Of writ of ejectment, the same as of writ of summons for each defendant	}	0	0	4
And in addition, for every folio of copy beyond three				
Correspondent's charges for service of writ, including affidavit of service, and exclusive of mileage in cases in which the fixed sum for costs does not apply		0	18	0
The like for service of subpoenas		0	8	6
Extra for subpoenas duces tecum		0	2	0
Notice of writ for service on a foreigner out of jurisdiction		0	3	0
Agents charges according to circumstances, &c.				
In cases in which the defendant shall avoid service, and an order shall be made to proceed, a sum will be allowed for attendances to serve according to circumstances.				
Of subpoena ad test.		0	5	0
Of subpoena duces tecum		0	7	0
Mileage as before.				

INSTRUCTIONS.

Instructions to sue or defend, for pleadings, special affidavits where allowed, and to counsel on special matters	0	6	8	0	3	4
To counsel in common matters	0	3	4	0	3	4
For brief	0	13	4	0	6	8
If difficult, and many witnesses or documents, discretionary					Nil.	
For every suggestion	0	6	8	0	3	4
For plea of suggestion	0	6	8	0	3	4
For issue in fact by consent	0	13	4	0	6	8
For suggestion to revive, or writ of revivor, when no rule necessary	0	6	8	0	3	4
For rule for writ of revivor, when necessary	0	6	8	0	3	4
For proceeding in error	0	6	8			
To defend for executor, after suggestion of death of original defendant	0	6	8	0	3	4
For agreement of damages	0	6	8	0	3	4
For grounds of error	0	6	8			
For assignment of errors after notice	0	6	8			
For confession of action in ejectment as to the whole or in part	0	6	8			
To reduce special jury	0	13	4			

DIRECTIONS TO MASTERS OF THE COURTS.

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DRAWING PLEADINGS, &c.

1853.

	Above 20l.			Under 20l.			
	£	s.	d.	£	s.	d.	
Declaration, inclusive of instructions and engrossing, and of attendance to file or deliver	1	5	0	0	10	0	
If above ten folios, for every folio	0	1	0	0	1	0	
One or more pleas, if three folios or under, exclusive of instructions but inclusive of ingrossing	0	4	0	0	3	0	
If above three folios, for every folio drawing	0	1	0	0	1	0	
Joinder of issue, inclusive of ingrossing	0	4	0	0	3	0	
Demurrer, inclusive of ingrossing	0	4	0	0	3	0	
Joinder in demurrer, inclusive of ingrossing	0	4	0	0	3	0	
Marginal statement of matter of law for argument, exclusive of copies for the Judges	0	6	8	0	3	4	
Replications, new assignments, grounds of error, assignment of errors, pleas to assignment of errors, and other pleadings, the same as the foregoing charges for pleas.							
Issue or demurrer book	0	6	8	0	3	4	
Record		Nil.			Nil.		
Postea, when drawn by attorney, including ingrossing, for every folio	0	1	0	0	1	0	
Judgment, whether by default or final	0	3	4	0	3	4	
Authority to receive moneys out of Court	0	3	0	0	2	0	
Suggestions, pleas to suggestions, and subsequent pleadings, of three folios or under, inclusive of ingrossment	0	4	0	0	3	0	
If above three folios, for every folio drawing	0	1	0	0	1	0	
Issue for the trial of facts by agreement, for every folio	0	1	0	0	1	0	
Special case, per folio	0	1	0	0	1	0	
Agreement of damages and copy, if five folios or under	0	6	8	0	3	4	
Above five folios, for every folio drawing	0	1	0	0	1	0	
And copy per folio	0	0	4	0	0	4	
Drawing writ of inquiry	0	3	4		Nil.		
Special particulars of demand or set-off and copy, per folio	0	0	8	0	0	4	
Short ditto, and copy	0	5	0	0	2	6	
Abstract of pleas, when necessary, and fair copy, and copy for Judge	0	5	4	0	3	4	
Bill of costs and copy for taxation, per folio	0	0	8		—		
Copy for the opposite party	0	0	4		—		
Drawing bill of costs and copy, per folio 4d., not to exceed					0	4	0
Copy for the opposite party, per folio 4d., not to exceed					0	4	0
Drawing and ingrossing common cognovit, and attendance thereon	0	13	4	0	6	8	
If special and long	1	0	0	0	10	0	

1853.

	Above 20 <i>l</i> .	Under 20 <i>l</i> .	
	£ s. d.	£ s. d.	
Replication accepting money out of Court in full of demand, inclusive of instructions	0 4 0	0 3 0	
Similiter or joinder of issue to obtain order to try before sheriff	0 3 0	

INGROSSING AND COPYING.

Declarations, above 10 folios, per folio	0 0 4	0 0 4
Other pleadings before enumerated, above 3 folios, per folio	0 0 4	0 0 4
Issue (pleadings), if 15 folios or under	0 5 0	—
If above 15 folios, for every folio	0 0 4	0 0 4
Issue (pleadings), if 10 folios or under	.	0 3 4
Above 10 folios, per folio	0 0 4
All proceedings on paper, per folio	0 0 4	0 0 4
The like on parchment, per folio	0 0 6	0 0 4
Judgments for non-appearance on specially indorsed writs, or writs of revivor, and in ejectment, to be taken as 9 folios, including the writ in actions above 20 <i>l</i> ., and 6 folios under 20 <i>l</i> .		

The allowance of 1*l* 3*s*. 2*d*. for interlocutory judgments will be discontinued, and the drawing, entry, and other charges will for the future be according to this scale.

The length of interlocutory and final judgments will be allowed as heretofore.

NOTICES.

To declare, reply, and subsequent pleadings, copy and service	0 4 0	0 3 0
By defendant to bring issue to trial, copy and service	0 4 0	0 3 0
For special jury to opposite attorney, copy and service, pursuant to section 109	0 5 0	0 3 0
The like to sheriff, pursuant to section 112	0 5 0	0 3 0
To executor or administrator of sole defendant deceased, to appear to writ and suggestion	0 5 0	0 3 0
To sheriff of renewal of execution, exclusive of any payment	0 5 0	0 3 0
To plaintiff in error to assign errors	0 5 0	0 3 0
Of discontinuance of error	0 4 0	0 3 0
Of confession of error	0 4 0	0 3 0
Of plaintiff's in error intention to proceed to personal representatives of defendant deceased	0 5 0	0 3 0
Of appearance when appearance duly entered and notice given on the day of appearance, but not otherwise	0 4 0	0 3 0
Of appearance to writ of revivor	0 5 0	0 3 0

DIRECTIONS TO MASTERS OF THE COURTS.

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	Above 20 <i>l</i> .			Under 20 <i>l</i> .			1853.
	£	s.	d.	£	s.	d.	
To plead	0	4	0	0	3	0	
Of declaration when necessary, copy and service	0	5	0	0	5	0	
Of objection for misjoinder or non-joinder of plaintiff, copy and service	0	4	0	0	3	0	
To sheriff to discharge a prisoner out of custody, copy and service	0	5	0	0	4	0	
Notice in ejectment to defend for part of premises and service	0	6	0	—			
If above 3 folios, for every folio additional	0	1	0	—			
Notice of admission of right and denial of ouster by a joint tenant, &c.	0	6	0	—			
If above 3 folios, for every folio	0	0	4	—			
Discontinuance by claimant in ejectment and service	0	5	0	—			
Of confession of action of ejectment as to the whole or in part, and service	0	10	0	—			
Of trial, inquiry, demand of residence of plaintiff, of authority for issuing writ, and all other common notices	0	4	0	0	3	0	
To admit or produce, if short	0	7	6	0	5	0	
The like, if long	0	10	0	0	5	0	
If very long and special, a larger allowance may be made in cases above 20 <i>l</i> .							
Additional allowance for mileage, as upon the service of a writ.							

COPY AND SERVICE.

Of special and common rules	0	5	0	0	4	0
Of special rule, above 3 folios, per folio additional	0	0	4	0	0	4
Of summons or order of a Judge	0	3	0	0	3	0
Of order to charge a prisoner in execution	0	5	0	—		
Of master's note of receipt and of affidavits in error in fact	0	7	0	—		
Of master's note of receipt in error in law	0	5	0	—		
Mileage on services as upon a writ of summons.						

EJECTMENT.

Instructions to sue, and examining deeds	0	13	4	—
If a question of title	1	1	0	—

ATTENDANCES.

To search for appearance to writ of summons	0	3	4	0	3	4
Two searches will be allowed, if necessarily made.						
To obtain undertaking to appear to process	0	5	0	0	5	0
To give undertaking to appear	0	5	0	0	5	0

1853.

	<i>Above 20l.</i>			<i>Under 20l.</i>		
	£	s.	d.	£	s.	d.
Deponent to be sworn (where allowed) for rules where no attendance in Court, to enter exception in bail, to leave writ at sheriff's office, to obtain return to writ, to alter or amend pleadings, to file any proceeding, to obtain office copies, consent to any summons, for postea (if necessary), to set down case, or demurrer, each judge with demurrer book or special case, to deliver points to each judge, to ascertain if books delivered, and other like attendances . . .	0	3	4	0	3	4
To set down causes for trial . . .	0	6	8	0	3	4
On each counsel with brief at trial, fee under twenty guineas, to reduce special jury, summons before a Judge, and to pay money into Court . . .	0	6	8	0	3	4
On counsel with brief, fee twenty guineas and above . . .	0	13	4	—		
To receive money out of Court . . .	0	10	0	0	6	8
Counsel with brief on motion, if above one guinea fee . . .	0	6	8	0	3	4
If one guinea only . . .	0	3	4	0	3	4
Consultation with counsel . . .	0	13	4	Nil.		
Conference with counsel . . .	0	6	8	—		
Fee on every record or writ of trial . . .	0	6	8	0	3	4
For common jury panel . . .	0	3	4	0	3	4
For special jury panel . . .	0	6	8	0	3	4
To obtain names of viewers . . .	0	6	8	0	3	4
To enter any suggestion on roll when necessary . . .	0	3	4	0	3	4
Attending court cause made remanet . . .	0	13	4	0	6	8
Attending for fresh panels after remanet as before.						
Attendances incidental to agreement of amount of damages according to the circumstances.						
Attendance in pursuance of notice to admit . . .	0	6	8	0	3	4
For every hour beyond one . . .	0	6	8	0	3	4
Attending making admissions, except under special circumstances . . .	0	6	8	0	3	4
On reference to master upon common matters, such as to compute upon a bill or bond . . .	0	6	8	0	6	8
Special matters . . .	0	13	4	0	6	8
For every hour after the first . . .	0	6	8	0	3	4
If counsel in attendance, attorney attending . . .	0	6	8	0	3	4
Above one hour . . .	0	13	4	0	6	8
To attest confession in ejectment . . .	0	6	8	—		
To file memorandum of error and obtain master's receipt . . .	0	6	8	0	3	4
Assizes each day, exclusive of expenses, but inclusive of all matters transacted except one attendance upon each counsel with brief . . .	2	2	0	—		
Expenses, exclusive of travelling, for each day . . .	1	1	0	—		

DIRECTIONS TO MASTERS OF THE COURTS.

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	Above 20l.			Under 20l.			1853.
	£	s.	d.	£	s.	d.	
Travelling expenses, the amount actually and reasonably paid, but in no case exceeding 1s. per mile one way.							
If two causes, in each per day for attendance	1	11	6	—			
If three causes or more, each	1	1	0	—			
If more than one cause, expenses at 1l. 1s. each day, and travelling expenses to be divided equally.							
Clerk's attendance discretionary if more than one cause, or in special cases not exceeding per day, inclusive of expenses, except travelling	1	1	0	—			
In assize towns in which two lists are made, and in special jury causes, the attendance of the attorney will not be allowed from the commission day, but only from such period as his attendance became proper.							
On writ of inquiry or writ of trial at a distance, if no other business, inclusive of expenses, per day	2	2	0	1	1	0	
If two cases, each	1	11	6	0	13	4	
If more than two cases, each	1	1	0	0	13	4	
Travelling expenses as before, and to be apportioned if more than one cause.							
In London or Middlesex or in same town, on trial or writ of inquiry, when cause in paper and not tried, per day	0	13	4	0	6	8	
On trial	1	1	0	0	13	4	
Ditto, if occupied the whole day	2	2	0	—			
Managing clerk to conduct cause at a distance when only one cause, per day	1	11	6	0	13	4	
If more than one cause, each	1	1	0	0	10	6	
Travelling and other expenses the same as attorney.							
Court on motion rule nisi granted	0	6	8	0	3	4	
The like on rule absolute after rule nisi	0	13	4	0	6	8	
The like previous to argument, per day	0	6	8	0	3	4	
The like in cases set down in the paper, not exceeding for a whole term	2	0	0	1	0	0	
After term when sittings, not exceeding	1	0	0	0	10	0	
Taxation on postea	0	13	4	0	3	4	
				to			
	1	0	0	0	6	8	
More according to time occupied.							
Ditto, costs of cause otherwise than on postea	0	6	8	0	3	4	
Ditto, costs of judgment only, and ordinary interlocutory matters	0	3	4	0	3	4	
BRIEFS.							
Minutes of evidence				0	13	4	
Brief and one fair copy where cause tried before a Judge of a Court of Record where attorneys are not allowed to act as advocates, not exceeding				2	0	0	

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	Above 20l. £ s. d.	Under 20l. £ s. d.
In the like case, fee to counsel and clerk		1 3 6
For drawing, per folio	0 1 0	—
Copying	0 0 4	—

TERM FEES AND LETTERS.

Proper business	0 13 0	0 10 0
Agency	0 15 0	0 12 0
Letters when no term fee proper business	0 3 0	0 2 0
Agency	0 5 0	0 3 0
Letters in interlocutory matters proper	0 2 0	—
Agency	0 3 0	—
In actions under 20l. no allowance will be made for "letters" for the vacation preceding the term in which a term fee shall be allowed.		

LETTERS.

Letter before action and other letters	0 3 6	0 2 0
Circular letters after the first	0 1 6	0 1 0

AFFIDAVITS.

Drawing special affidavits, per folio	0 1 0	0 1 0
Ingrossing same, exclusive of affidavits of increase	0 0 4	Nil.
Common affidavits, of five folios or under, including ingrossing and oath	0 6 0	0 5 0
Affidavit of increase, including ingrossing and oath		0 5 0
Copy for the other side		0 2 0

SEARCHES.

All common searches, exclusive of payment	0 3 4	0 3 4
If very long	0 13 4	0 6 8

COUNSEL.

To attend reference to master, not exceeding, except on examination of witnesses	2 2 0	Nil.
To settle special indorsement on writ	Nil.	Nil.

WARRANT OF ATTORNEY.

Costs of signing judgment	3 10 0	—
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DEFENDANTS.

Appearance	0 7 0	0 6 0
For each additional defendant, inclusive of payment	0 1 6	0 1 6
A second summons and order for time to plead shall be allowed in special cases above 20l. when necessary.		

DIRECTIONS TO MASTERS OF THE COURTS.

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COUNSEL'S CLERK'S FEES.

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	Above 20l.			Under 20l.		
	£	s.	d.	£	s.	d.
The fees to be allowed to counsel's clerk not to exceed as under :—						
Upon a fee under 5 guineas	0	2	6	—		
5 guineas and under 10 guineas	0	5	0	—		
10 guineas and under 20 guineas	0	10	0	—		
20 guineas and under 30 guineas	0	15	0	—		
30 guineas and under 50 guineas	1	0	0	—		
50 guineas and upwards	2	10	0	—		

per Cent.

ON CONSULTATIONS.

Senior's clerk	0	7	6	—
Junior's clerk	0	2	6	—
On general retainer	0	10	6	—
On common retainer	0	2	6	—
On conference	0	5	0	—

Allowance to Witnesses.

	If resident in the Town in which the Cause is tried.			If resident at a Distance from the Place of Trial.		
	£	s.	d.	£	s.	d.
Common witnesses, such as labourers, journeymen, &c., per diem	0	5	0	0	5	0
Master tradesmen, yeomen and farmers, per diem	0	7	6	0	7	6
Auctioneers and accountants, per diem	0	10	0	0	10	0
Professional men, per diem	0	10	6	0	10	6
Ditto inclusive of all, except travelling, expenses, per diem	1	1	0	1	1	0
Attorneys or other clerks, per diem	1	1	0	2	2	0
Engineers and surveyors, per diem	1	1	0	3	3	0
Notaries per diem	1	1	0	0	15	0
Gentlemen	1	1	0	1	1	0
Esquires	1	1	0	1	1	0
Bankers	1	1	0	3	3	0
Merchants	1	1	0	1	1	0
Females according to station in life, per diem	0	5	0	0	5	0

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	If resident in the Town in which the Cause is tried.			If resident at a Distance from the Place of Trial.		
	£	s.	d.	£	s.	d.
Police Inspector, per diem	0	5	0	0	7	6
				to		
				0	10	0
Police Constable	0	3	0	0	5	0
				to		
				0	7	6

If the witnesses attend in one cause only they will be entitled to the full allowance. If they attend in more than one cause they will be entitled to a proportionate part in each cause only. The travelling expenses of witnesses shall be allowed according to the sums reasonably and actually paid, but in no case shall exceed 1s. per mile one way.

Miscellaneous.

Close copy of proceedings in agency cases, 4d. per folio, according to actual length.

In cases under 20l. no allowance will be made in respect of the following matters :—

Attending deponent to be sworn to affidavit.

Advice on evidence.

Maps, plans, or models.

For maps or plans, when used in cases above 20l., from 1l. 1s. to 3l. 3s.

All other allowances will be made as heretofore, except so far as it may be necessary to reduce or increase the same conformably to the scale of fees published on the 24th November 1852.

CAMPBELL.
JOHN JERVIS.
FRED. POLLOCK.
E. H. ALDERSON.
W. WIGHTMAN.
T. J. PLATT.
W. ERLE.
T. N. TALFOURD.
SAML. MARTIN.

27th January 1853.

IV.

On 10th *February*, 1853, copies of the following Rules, Orders and Regulations were laid before the House of Lords by Lord *Campbell* C. J., and before the House of Commons by Sir *A. J. E. Cockburn*, Attorney General.

RULES, ORDERS, and REGULATIONS, made by the JUDGES,
in pursuance of the COMMON LAW PROCEDURE ACT.

HILARY TERM, 1853.

WHEREAS, pursuant to the provisions of the statute passed in the session of Parliament held in the third and fourth years of the reign of His late Majesty King William the Fourth, intituled "An Act for the further Amendment of the Law and the better Advancement of Justice," the Judges of the Superior Courts of Common Law at Westminster made certain rules, orders, and regulations as to the mode of pleading and other matters in the said Act mentioned, which said rules, orders, and regulations were duly laid before both Houses of Parliament, as required by that statute, and came into effect and operation respectively on the first day of Easter Term, in the year of our Lord one thousand eight hundred and thirty four, and the first day of Michaelmas Term, in the year of our Lord one thousand eight hundred and thirty eight:

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And whereas it is provided by the "Common Law Procedure Act, 1852," that it should be lawful for the Judges of the Courts of Common Law at Westminster, or any eight or more of them, of whom the chiefs of each of the said Courts should be three, from time to time to make all such general rules and orders for the effectual execution of that Act, and of the intention and object thereof, and for fixing the costs to be allowed for and in respect of the matters therein contained, and the performance thereof, and for apportioning the costs of issues, and for other purposes mentioned in the said Act, as in their judgment should be necessary or proper; and to

1853.

exercise all the powers and authority given to them by an Act of Parliament passed in the session of Parliament held in the thirteenth and fourteenth years of the reign of Her present Majesty, intituled "An Act to enable the Judges of the Courts of Common Law at Westminster to alter the Forms of Pleading," with respect to any matter therein contained relative to practice or pleading; and the provisions of the said last mentioned Act, as to the rules, orders, or regulations made in pursuance thereof, should be held applicable to any rules, orders, or regulations which should be made in pursuance of the said Common Law Procedure Act, one thousand eight hundred and fifty two:

And whereas by the said Act passed in the session of Parliament held in the thirteenth and fourteenth years of the reign of Her present Majesty powers were given to the Judges of the Courts of Common Law at Westminster, by rules and orders, to make alterations in the forms of pleading in the said Courts, and respecting other matters in that Act mentioned; and it was enacted, that all such rules, orders, or regulations should be laid before both Houses of Parliament in manner directed by the said Act; and that no such rule, order, or regulation should have effect until three months after the same should have been so laid before both Houses of Parliament; and that any rule, order, or regulation so made should from and after such time aforesaid be binding and obligatory on the said Courts, and all other Courts of Common Law, and on all Courts of Error, and be of like force and effect as if the provisions contained therein had been expressly enacted by Parliament:

And whereas it is expedient, for the effectual execution of the said "Common Law Procedure Act, 1852," that the said rules, orders, and regulations respectively made in pursuance of the said statute passed in the session of Parliament held in the third and fourth years of the reign of His late Majesty King William the Fourth, should be repealed, and that other rules, orders, and regulations should be framed in lieu thereof:

It is therefore ordered, that from and after the first day of Trinity Term next inclusive, unless Parliament shall in the meantime otherwise enact, the said rules, orders, and regulations made respectively in pursuance of the said statute passed in the session of Parliament held in the third and fourth years of the reign of His late Majesty King William the Fourth shall be and are hereby repealed, excepting so far as the same or any of them are necessary or applicable to any pleadings, proceedings, or other matters to which they relate, had or taken previous to the said first day of Trinity Term next; and the following rules, orders, and regulations shall be in force; that is to say:—

1. Except as hereinafter provided, several counts on the same cause of action shall not be allowed, and any count or counts used in violation of this rule may, on the application of the party objecting, within a reasonable time, or before an order made for time to plead, be struck out or amended

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by the Court or a Judge, on such terms, as to costs or otherwise, as such Court or Judge may think fit.

2. Several pleas, replications, or subsequent pleadings, or several avowries or cognizances founded on the same ground of answer or defence, shall not be allowed; provided, that on an application to the Court or a Judge to strike out any count, or on an objection taken before the Judge on a summons to plead several matters to the allowance of several pleas, replications, or subsequent pleadings, avowries, or cognizances on the ground of such counts or other pleadings being in violation of this rule, the Court or the Judge may allow such counts on the same cause of action, or such pleas, replications, or subsequent pleadings, or such avowries or cognizances founded on the same ground of answer or defence, as may appear to such Court or Judge to be proper for the determining the real question in controversy between the parties on its merits, subject to such terms, as to costs and otherwise, as the Court or Judge may think fit.

3. When no such rule or order has been made as to costs by the Court or Judge, and on the trial there is more than one count, plea, replication, or subsequent pleading, avowry, or cognizance on the record, founded on the same cause of action or ground of answer or defence, and the Judge or presiding officer before whom the cause is tried shall at the trial certify to that effect on the record, the party so pleading shall be liable to the opposite party for all costs occasioned by such count, plea, or other pleading in respect of which he has failed to establish a distinct cause of action or distinct ground of answer or defence, including those of the evidence as well as those of the pleading.

4. The name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, or in any subsequent pleading.

Provided, that, in cases where local description is now required, such local description shall be given.

5. In all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorized by Act of Parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially denied.

6. In all actions on simple contract, except as hereinafter excepted, the plea of non assumpsit, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract, promise, or agreement alleged may be implied by law.

Exempli gratia. In an action on a warranty, such pleas will operate as a denial of the fact of the sale and warranty having been given, but not of the breach; and, in an action on a policy of insurance, of the sub-

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scription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

In actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, such pleas will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach.

To causes of action to which the plea of "never was indebted" is applicable, as provided in Schedule B. (36) of the Common Law Procedure Act, 1852, and to those of a like nature, the plea of non assumpsit shall be inadmissible, and the plea of "never was indebted" will operate as a denial of those matters of fact from which the liability of the defendant arises; *exempli gratià*, in actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery, in point of fact; in the like action for money had and received it will operate as a denial both of the receipt of money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

7. In all actions upon bills of exchange and promissory notes, the plea of "non assumpsit" and "never indebted" shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *exempli gratià*, the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

8. In every species of actions on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *exempli gratià*, infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded.

9. In actions on policies of assurance, the interest of the assured may be averred thus:—"That *A, B, C, and D*, [or some or one of them,] were or was interested," &c. And it may also be averred, "that the insurance was made for the use and benefit, and on the account, of the person or persons so interested."

10. In actions on specialties and covenants, the plea of non est factum shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

11. The plea of "nil debet" shall not be allowed in any action.

12. All matters in confession and avoidance shall be pleaded specially, as above directed in actions on simple contracts.

13. In any case in which the plaintiff (in order to avoid the expense of the plea of payment or set-off) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set-off, it shall not be necessary for the defendant to plead the payment or set-off of such sum or sums of money.

But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums, or to cases of set-off where the plaintiff does not state the particulars of such set-off.

14. Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar.

15. In actions for detaining goods, the plea of non detinet shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea.

16. In actions for torts, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

Exempli gratia. In an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial to the plaintiff's occupation of the house.

In an action for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way.

In an action for slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate in denial of speaking the words, of speaking them maliciously, and in the defamatory sense imputed, and with reference to the plaintiff's office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged.

In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

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In actions against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

17. All matters in confession and avoidance shall be pleaded specially, as in actions on contract.

18. In actions for trespass to land, the close or place in which, &c. must be designated in the declaration by name or abutments or other description, in failure whereof the plaintiff may be ordered to amend, with costs, or give such particulars as the Court or Judge may think reasonable.

19. In actions for trespass to land, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially.

20. In actions for taking, damaging, or converting the plaintiff's goods, the plea of not guilty shall operate as a denial of the defendant having committed the wrong alleged, by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein.

21. In every case in which a defendant shall plead the general issue, intending to give the special matter in evidence, by virtue of an Act of Parliament, he shall insert in the margin of the plea the words, "By Statute," together with the year or years of the reign in which the Act or Acts of Parliament upon which he relies for that purpose were passed, and also the chapter and section of each of such Acts, and shall specify whether such Acts are public or otherwise, otherwise such plea shall be taken not to have been pleaded by virtue of any Act of Parliament; and such memorandum shall be inserted in the margin of the issue, and of the nisi prius record.

22. A plea containing a defence arising after the commencement of the action may be pleaded together with pleas of defences arising before the commencement of the action, provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading of such first-mentioned plea.

23. When a plea is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause up to the time of pleading such plea; provided that this and the preceding rule shall not apply to the case of such plea pleaded by one or more only out of several defendants.

24. Courts of Error may award a repleader, or direct a trial de novo.

25. The costs of proceeding in error shall be taxed and allowed as costs in the cause, and no double costs in error shall be allowed to either party.

26. On error from one of the superior Courts such Court shall have power to allow interest for such time as execution has been delayed by the proceedings in error, for the delaying thereof; and the Master, on taxing the costs, may compute such interest without any rule of Court or order of a Judge for that purpose.

27. In no case shall error be brought for any error in a judgment with respect to costs, but the error (if any) in that respect may be amended by the Court in which such judgment may have been given, on the application of either party.

28. A person admitted to sue in forma pauperis shall not in any case be entitled to costs from the opposite party, unless by order of the Court or a Judge.

29. If a plaintiff in ejectment be nonsuited at the trial, the defendant shall be entitled to judgment for his costs of suit.

30. If the plaintiff in ejectment appear at the trial, and the defendant does not appear, the plaintiff shall be entitled to a verdict without producing any evidence, and shall have judgment for his costs of suit, as in other cases.

31. No entry or continuances, by way of imparlance, curia advisari vult, vicecomes non misit breve, or otherwise, shall be made upon any record or roll whatever, or in the pleadings.

32. All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day: Provided that it shall be competent for the Court or a Judge to order a judgment to be entered nunc pro tunc.

CAMPBELL.

JOHN JERVIS.

FRED. POLLOCK.

E. H. ALDERSON.

J. T. COLERIDGE.

C. CRESSWELL.

T. J. PLATT.

ED. VAUGHAN WILLIAMS.

SAMUEL MARTIN.

CHARLES CROMPTON.

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In an action on the case by the organist of *B.* church against the Local Board of Health, for a breach of duty in not paying his salary, alleging that they had sufficient funds for the purpose, it appeared at the trial that the Board had funds applicable to the

payment of the salary, though the mortgage debt not yet paid exceeded the cash balance in hand.

Held: that the Board and the organist stood in the relation of trustee and cestui que trust; and that, in the absence of a specific appropriation of a part of the fund to the plaintiff, no action at law lay: the remedy being in equity. *Edwards v. Lowndes*, 81.

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appear, and directing his apprehension, to answer to the complaint, and be further dealt with according to law. The plaintiff, under this warrant, was apprehended and imprisoned. The conviction was afterwards quashed ; and plaintiff brought an action for false imprisonment against defendant. Held :

1. That defendant was not protected by stat. 11 & 12 *Vict.* c. 44. s. 2., the summons to appear after the conviction not being the summons spoken of in that section, the non-appearance to which was to prevent the maintenance of an action.

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2. Time within which the award is to be made under the Lands Clauses Consolidation Act.

An act passed in 1844, for making a railway from *A.*, contained a clause that nothing in that Act should prevent its being subject to any general Act, relating to railways, subsequently passed. It also contained a clause authorizing *The L. & M. Railway Company* to purchase the line. *The L. & M. Railway Company* did purchase the line. In 1847 an Act was passed, reciting the Acts under which *The L. & M. Railway* and its branches were made, including the Act of 1844, and, that it was expedient that the powers conferred by them should be altered. It changed the name of the Company from *L. & M. Railway Company* to *The L. & Y. Railway Company*, and incorporated the general Acts of 1845 with that Act, so far as not inconsistent therewith.

The L. & Y. Railway Company injuriously affected lands of *O.*, after 1847, by works done under the powers of the Act of 1844. *O.* gave notice that he chose to have his claim settled by arbitration under *The Lands Clauses Consolidation Act*, 1845; and, the Company not having done anything, he formally appointed *F.* arbitrator for both. *F.* made his award, but more than three months after his appointment.

Held, that *The Lands Clauses Consolidation Act*, 1845, applied, and that *O.* was entitled to have the claim set-

tled by arbitration in manner provided in sect. 68. But held, also, that sect. 23 applied as well to arbitrations under sect. 68 for claims for damages to lands taken, as to arbitrations for claims for lands intended to be taken; and consequently that the award was out of time. *Evans v. Lancashire and Yorkshire Railway Company*, 754.

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The Court has a discretion to admit accused persons to bail in all cases; but in exercising that discretion, the nature of the charge, the evidence by which it is supported, and the sentence which by law may be passed in the event of a conviction, are in general the most important ingredients for the guidance of the Court; and, where these are weighty the Court will not interfere.

Four foreigners were committed, on the coroner's inquest and by the warrant of justices, to take their trial for wilful murder committed in a duel.

Two of them, when before the committing magistrates, avowed that they acted as seconds to the deceased. An application was made on their behalf to this Court to admit them to bail, on affidavits, by these prisoners, that they had acted only as seconds, that the duel was fair, that they were foreigners ignorant of the law and believing that they were bound as men of honour to act as they did, and that acting as seconds was not pun-

ishable in their own country; and they pledged themselves, in the event of being admitted to bail, to abide their trial.

Held that, assuming these facts to be accurate, they afforded no ground for the Court interfering to bail persons proved by their own confession to be guilty of a capital offence.

An application was afterwards made in favour of the two other prisoners, who had not made any such confession. This application was made on an affidavit containing a copy of the depositions before the coroner's inquest, and the committing magistrates, the prisoners making no affidavit. The Court took time to examine the depositions; and, being satisfied that the evidence was sufficient to authorize sending the prisoners to trial, refused to interfere. *Baron's Case*, 1.

II. Rules and Regulations.

1. Capias. *App.* xvi. 81. xvii. 82.
2. Justification. *App.* xviii. 96.—103. xxi. 111.
3. Render in discharge of bail. *App.* xx. 104.—108.
4. The persons who become bail. *App.* xvii. 86. xviii. 91.—94. xx. 100.
5. Notice of bail. *App.* xviii. 96.—98. 100.
6. Notice of exception. *App.* xix. 99.
7. Liability of: limit. *App.* xxi. 109.
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9. Bringing in the body. *App.* xvii. 88.—90.
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11. Bailpiece.
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App. xix. 100. *App.* xx. 103.

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App. xvii. 83.—89. xxi. 108. 109.

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I. Seizure by and payment to his manager, 360. *Execution*, I. 1.

II. Where circumstances of aggravation affecting the sheriff do not affect the bailiff, 360. *Execution*, I. 1.

BANKRUPT.

I. Act of bankruptcy : Bill of sale.

1. Not a bill of sale to secure advances made on the faith of the security.

Y., a trader, being indebted to *L.* in 200*l.*, agreed with defendant that, on defendant paying the 200*l.* to *L.*, *Y.* would assign by bill of sale all her effects to defendant, to secure the 200*l.* A deed of assignment was executed, some months after : it contained a power for defendant to enter, and take all the effects which might be on the premises at the time of such entry, and sell them, and, out of the price, to repay himself the 200*l.*, and pay expenses of sale, and pay the residue to *Y.* *Y.* covenanted to pay the 200*l.* by instalments, and was to remain in possession till default in payment. Afterwards *Y.*, who had remained in possession, sold the effects for 567*l.*, and, out of that sum, paid the 200*l.* to defendant.

Y. having afterwards become bankrupt, her assignees sued defendant to recover the 200*l.*, and relied on the execution of the deed as an act of bankruptcy and fraudulent against creditors. The jury having found

that the deed was not executed with intent to defeat or delay creditors, and the payment not made in contemplation of bankruptcy, and a verdict having thereupon been directed for defendant :

Rule for new trial refused, the execution of the deed not being necessarily in itself an act of bankruptcy. For the transaction was as if the deed had been executed at the time of the payment by defendant to *L.*, which constituted a good consideration between *Y.* and defendant ; and the clause enabling the defendant to sell after acquired property did not vitiate the transaction. *Hutton v. Crutwell*, 15.

2. Not necessarily so because it extends to after acquired property, 15. *Ante*, 1.

3. What consideration not antecedent, 15. *Ante*, 1.

II. Interests that pass to the assignees.

The interest in part of a divisible contract, 66, 879. *Insurance*, I. 1, 2.

III. Judge's order for judgment against trader.

Costs of filing. *App.* vii. 28.

IV. Composition deed under s. 224.

1. Necessity of provision for distribution of whole estate.

Debt for goods sold. Plea : a composition deed, executed after the taking effect of the Bankrupt Consolidation Act, 1849 (12 & 13 *Vict. c.* 106.), by two sureties, by defendant, a trader, and by six sevenths of his creditors to the amount of 10*l.* : not including plaintiffs ; by which defendant and his sureties covenanted to pay 7*s.* 6*d.* in the pound to each creditor, to be secured by notes of himself and sureties, and the creditors in consideration thereof released defendant. Held, by the Queen's Bench, that this deed was binding on the plaintiffs, under sect. 224, though it did not provide for the distribution of the whole of the trader's estate. Held,

by the Court of Exchequer Chamber, reversing this judgment, that sect. 224 does not make any deed of arrangement binding on a creditor, who has not executed it, unless such deed provides for the distribution of the whole of the trader's estate, as in bankruptcy. *Tetley v. Taylor*, 621.

2. Authority to return part to debtor.

A deed signed by six sevenths of creditors to the amount of 10*l.* and upwards is not valid under stat. 12 & 13 *Vict. c. 106. s. 224*, though it conveys the debtor's whole estate to trustees, if it empowers them to give back to the debtor effects to the value of 20*l.* *Cooper v. Thornton*, 544.

BARON AND FEME.

I. Agency.

Effect of dealings with supposed wife's goods under a marriage which turns out to be void, 749. *Marriage*.

II. Pleading.

A declaration by husband and wife on an account stated must shew that the accounting was concerning matters in which the wife had an interest. So held, on demurrer to a declaration posterior to the coming into effect of stat. 15 & 16 *Vict. c. 76. Johnson v. Lucas*, 659.

BASTARD.

His settlement after sixteen, 465. *Poor*, III.

BEER.

Jurisdiction of justices under Beer Acts; place.

Over offence of using false certificate of rating.

Justices for a petty sessional division of the county of *K.* convicted *W.* under the Beer Acts (11 *G. 4* & 1 *W.*

4. *c. 64.*, 4 & 5 *W. 4. c. 85.*, and 3 & 4 *Vict. c. 61.*) for knowingly using at the borough of *M.* (which is out of the general jurisdiction of the justices of *K.*) a false certificate relative to the rating of a house, within the petty sessional division, occupied by the defendant, for the purpose of obtaining a licence for himself to retail beer on the premises. The conviction being brought up by certiorari:

Held by Lord Campbell C. J., *Wightman J.* and *Crompton J.* (*Cole-ridge J.* dissentiente) that the jurisdiction to adjudicate on this offence was not given, by the Beer Acts, to the justices within whose jurisdiction the house to which the licence was intended to be applied was, but remained with the justices within whose jurisdiction the offence was committed. Conviction quashed. *Regina v. Waghorn*, 647.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. Notice of dishonour.

What sufficient.

The following notice of dishonour of a bill held sufficient.

"We beg to acquaint you with the non-payment of *W. M.*'s acceptance to *J. W.*'s draft of 29th *December* last, at 4 months, 50*l.*, amounting, with expenses, to 50*l. 5s. 1d.*; which remit us in course of post without fail, or pay to Messrs. *E.*" *Everard v. Watson*, 801.

II. Staying proceedings.

On payment of debt and costs. *App.* vi. 24.

III. Pleading.

What pleas in denial inadmissible. *App. lxxx. 7.*

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Page 609. *Consistorial Court*.

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Remedy against for not paying money pursuant to statute, 81. *Action*, II. 1.

BOND.

I. Under a statute prohibiting preference.

Whether an action will lie.

By stat. 6 & 7 W. 4. c. cxii. a pier company were authorized to borrow 30,000*l.* on mortgage of the undertaking; or, if they thought fit, on bonds made in such manner and payable at such time as they thought fit. And the act provided that all persons, owners of any such securities either by way of mortgage or bond, should be "equally entitled to a claim or lien on the rents, rates, tolls, and profits," "without any preference by reason of the priority of date of any such securities or on any other account whatsoever." Debt, on a bond under the seal of the Company. The condition, which was set out on oyer, recited the above enactment, and was for the payment of money on a day certain. On demurrer:

Held; that an action lay on such a bond; and plaintiff was entitled to judgment.

Quære. Whether the effect of the

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clause forbidding a preference might not be to restrain the issuing of execution on that judgment. *Bolchov v. Herne Bay Pier Company*, 74.

II. In particular instances.

1. To secure money advanced for public works, 74. *Ante*, I.

2. To secure price for equality in exchange, 54. *Partition*, I. 1.

3. Surety bond, 295. *Surety*, II. 1.

4. Bailbond. *Bail*.

III. Accord before breach, 295. *Surety*, II. 1.

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BRIBERY.

At municipal elections, in *Regina v. Thwaites*, 705 n.

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I. Illegality by reason of nonsubscription, 372. *Company*, VI. 6.

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CENTRAL CRIMINAL COURT.

Transfer of indictment to. *Regina v. Sill*, 553 n.

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Proceedings on return of. *App.* xvii. 90.

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Offence of using false certificate of rating, 647. *Beer*.

CERTIORARI.

I. Clauses taken away.

1. Transfer of indictment to Central Criminal Court notwithstanding. *Regina v. Sill*, 553 n.

2. Defective adjudication of costs, when it does not take the case out of the operation of the clause.

By a local and personal act (6 G. 4. c. lxxii.) Commissioners were empowered to levy rates for the improvement of the town of *N.*, payment of which might be enforced by distress under the warrant of a justice. The Commissioners might sue and be sued by their clerk. Appeal to Sessions was given against any rate or order made under the Act; and the Sessions had power to give costs to either party. No order, rate or judgment was to be quashed for want of form or removed by certiorari.

A justice made an order upon *B.* for payment of a rate which had been laid; and *B.* appealed to Sessions: the Sessions, by a judgment, given after stat. 12 & 13 *Vict.* c. 45., dismissed the appeal and directed the

appellant to pay costs to the clerk of the Commissioners.

Semble, per *Crompton J.*, that this was right, and that it was not necessary that the order should be to pay the costs to the clerk of the Court, under stats. 11 & 12 *Vict.* c. 43. s. 27., 12 & 13 *Vict.* c. 45. s. 5.

But held that, supposing the order erroneous in this respect, it was a mere defect in form, and there was no want of jurisdiction so as to bring the case out of the operation of the clause taking away the certiorari. *Regina v. Binney*, 810.

3. The clauses do not apply where no offence is shewn, 286. *Game*, II.

II. Costs.

1. On indictment removed by certiorari: who not within statute.

The defendant was committed by the Lord Mayor of *London* for trial for an indecent assault. An indictment, found at the Central Criminal Court, was removed into this Court by certiorari, at the instance of the defendant. The defendant was convicted. The prosecution was conducted by the city solicitor, in obedience to the directions of the Lord Mayor, given at the time he committed the defendant; and the expenses were defrayed out of the City funds. Held, that the case was not within stat. 5 & 6 *W. & M.* c. 11. s. 3., inasmuch as the Lord Mayor was not personally liable for the expenses, and could not be considered as a prosecutor. And a side bar rule taken out to tax the costs was set aside. *Regina v. Wilson*, 597.

2. Costs defrayed by subscriptions. *Regina v. Cook*, 599 n.

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CHARTER.

I. Revocation.

For breach of conditions subsequent :
express and implied powers.

Scire facias to repeal a charter incorporating a trading company. The charter directed, amongst other things, that the Company should not begin business until it had been certified to the President of the Board of Trade, by at least three of the Directors, that, at least, one half of the capital had been subscribed for, and at least 50,000*l.* paid up. The charter contained a proviso that, in case the Corporation should not comply with any "the directions and conditions in Our said letters patent contained," it should be lawful for the "Queen, by any writing under the great seal or under the sign manual," to revoke the charter, "either absolutely, or under such terms or conditions as the Queen should think fit. The declaration in sci. fa., which was at the relation of a private prosecutor, contained, amongst others, a suggestion that, before the Company began business, a certificate was given by the Directors that 50,000*l.* had been paid up, which was false in fact, to their knowledge ; and, this suggestion being traversed, the verdict was found for the Crown. On a rule to arrest the judgment, on the ground that the declaration did not shew that the Queen had, by writing under the great seal or sign manual, revoked the charter : Held by Lord Campbell C. J. and Wightman J. that the express power reserved by the charter, to revoke it wholly or in part, was in addition to and consistent with

the implied right of the Crown to revoke it by sci. fa. on breach of a condition subsequent ; that there was no distinction, in this respect, between a sci. fa. by a private prosecutor, in the name of and with the consent of the Crown, and one at the instance of the Crown ; and that the declaration in sci. fa. was sufficient. Held by Coleridge J. and Erle J. that the express power to revoke superseded the implied power of revocation, and that it was necessary that there should be a revocation, by writing under the great seal or sign manual, for this condition broken, before any sci. fa. The Court being equally divided, the rule dropped. *Regina v. Eastern Archipelago Company, 310.*

2. By sci. fa. or by writing, 310.
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II. Conditions subsequent.

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310. *Ante, I. 1.*

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I. Repeal or revocation of charter for breach of condition subsequent, 310. *Charter*, I. 1.

II. Subscription contract.

1. When not necessary, 253. *Post*, VI. 4.

2. What return does not shew that it cannot be procured, 253. *Post*, VI. 4.

III. Corporate funds.

1. Effect of failure, 178. *Post*, VI. 1.

2. Implication as to, 228. *Post*, VI. 3.

3. Subscription contract not required for extension, 253. *Post*, VI. 4.

4. Where compulsory powers have been partially acted on, though the statutory capital has not been subscribed, 372. *Post*, VI. 6.

IV. Registration of shares and transfers.

1. Liability of company to action for omission to register transfer.

Declaration in case against an incorporated railway company (under stat. 9 & 10 *Vict. c. clvi.*, incorporating the Companies Clauses Consolidation Act, 1845,) stated that, before and at the time of the execution of the deed of transfer after mentioned, *N.* appeared by a book of defendants kept by defendants in pursuance of the provisions of The Company's Clauses Consolidation Act, 1845, called The Register of Shareholders, to be, and then was, lawful owner of 300 shares in the undertaking of defendants; that plaintiff bought the shares of *N.*, and *N.*, by a deed duly stamped, signed, sealed and delivered by him to plaintiff, transferred the shares to plaintiff, subject to the conditions on which *N.* held them at the time of the execution; that the deed was according to the form in Schedule B. to the last mentioned Act; and that plaintiff afterwards caused the same to be delivered to *G.*, the secretary of defendants and their agent in that behalf, to be kept by them, in order that defendants might enter a memorial in The Register of Transfers, and endorse such entry on the deed of transfer; and might on demand deliver a new certificate to plaintiff as purchaser of the shares, according to the provisions of the last mentioned Act. Breach, that defendants did not, nor did *G.* nor any other person on defendants' behalf, enter any memorial &c., or indorse any entry &c., whereby plaintiff had been deprived of his right and

title to appear in the books of defendants as holder and proprietor of the shares: whereby, and by reason of *N.* still appearing by The Register of Shareholders to be holder and proprietor of the shares, and of calls having been made by defendants, after the committing &c., upon persons so appearing by the last mentioned book to be holders and proprietors of the said shares, and (among others) upon *N.*, and by reason of the failure of *N.* to pay the calls (plaintiff having received no notice of forfeiture), defendants, to wit by the directors of the Company, did, according to the provisions of the last mentioned Act, declare the shares forfeited; which forfeiture having been afterwards and according to the provisions of the last mentioned Act confirmed at a general meeting of the Company, and the shares so forfeited directed to be sold for the purposes in the last mentioned Act declared, and according to the provisions thereof, the shares so forfeited were afterwards sold by defendants, to wit by the said directors, by public auction: and plaintiff had thereby been deprived of his right to compel defendants to make such entry and indorsement as aforesaid, and to deliver to plaintiff such certificate, and had also been deprived of the shares and all benefit thereof, and all the dividends and other profits, which he might have derived therefrom, and also of the benefit of selling shares at an increased premium, the shares having, since the committing &c., risen in value.

2nd count, stating that plaintiff, at the time of the committing &c., was the lawful holder, and well entitled to, 300 shares in the undertaking of defendants; that defendants, without lawful cause, and in pretended exercise of the powers confirmed by the Company's Clauses Consolidation Act, 1845, wrongfully declared the shares forfeited, and afterwards confirmed such forfeiture, and afterwards sold the shares: whereby plaintiff had been deprived of the said shares and the benefit thereof, &c. (as in 1st count).

Held, on special demurrer:

That both counts disclosed a good

cause of action, inasmuch as they shewed a wrongful act of omission by defendants in neglecting to register, and also wrongful acts of commission by them in declaring and confirming the forfeiture, and selling the shares; and that such acts were not simply inoperative, but that the declaration disclosed an actual loss to the plaintiff, resulting from those acts.

Held, also, that it was not necessary for plaintiff expressly to aver that a reasonable time for registering the shares had elapsed. *Catchpole v. Ambergate &c. Railway Company*, 111.

2. Pleading: reasonable time, 111. *Ante*, 1.

V. Extension of Works.

By an already existing company, 253. *Post*, VI. 4.

VI. Obligation to carry out statutory purposes.

1. Obligation on Railway Company to complete line.

Per Lord Campbell C. J., and Crompton J.

When a Railway Company have obtained an act of Parliament, reciting that the formation of a railway from *A.* to *D.* will be beneficial to the public and that the Company are willing to execute it, and giving them compulsory powers upon landholders for that purpose, and the Company, in exercise of the powers, have taken lands and thereupon made part of their line, they are bound by law to complete such line, not only to the extent to which they have taken lands, but to the farthest point. Although the statute enacts only that it "shall be lawful" for them to make the railway.

And although the uncompleted portion, from *B.* to *C.*, is a line substituted by a later statute for the line marked out between the same points by the original act.

Mandamus lies to compel the entire completion, at the instance of a landholder whose land has been required

or is prejudiced by the non-completion.

And, if, by the expiration of powers, it has become impossible to finish the line up to the original terminus, a mandamus lies nevertheless to complete it up to the point at which the practicability ceased.

It is not a good return, that the line of which the completion is demanded has become superfluous, or from the circumstances of the district would be inconvenient, or would not remunerate the Company :

Nor that the funds which can in reasonable probability come to the possession of or be disposable by the Company will fall short by 100,000*l.* of the sum required to make the railway authorized by their Act, and which the writ commands them to make.

Semble, however, that, if there appeared an entire failure of funds from unforeseen casualties, and without imprudence or bad faith in the Company, the Court, in its discretion, would refuse a mandamus.

And that absolute want of funds, or of means to obtain them, might be returned to the writ.

Held by *Erle J.* : That a statute using permissive words as above does not of itself oblige the Company to complete their line.

And that, if, under such a statute, they have exercised a compulsory power of taking lands, they are not therefore obliged to complete the line any farther than such power has been exercised. *Regina v. York and North Midland Railway Company*, 178.

See *S. C.* in error. *Post*, 2.

2. Statute enabling not obligatory.

An Act for making a railway recited that the formation of the railway would be beneficial to the public, and that the Company were willing to execute it; and the power of compulsory taking lands, with the then ordinary powers, were given to the Company. A mandamus issued, commanding the Company to complete the line.

Held by the Exchequer Chamber,

reversing the decision of the Queen's Bench, that the mandamus ought not to go, no duty being cast on the Company to make the line; the words of the Act being enabling not obligatory, and there being nothing in the subject matter or context to require that they should be construed as compulsory.

And that the case was not affected by the fact that the Company had completed a part of the line. *York and North Midland Railway Company v. The Queen*, 858.

3. The obligation begins when the act receives the Royal assent.

Per Lord Campbell C. J., *Coleridge and Crompton J.s.*; *Erle J.* dissentiente :

A Company having obtained an act of Parliament for making a railway, on representation that it will be for the public benefit, with compulsory powers for taking lands along the proposed line, is bound, from the time when such act receives the Royal assent, to execute the work.

The Royal assent makes the Act binding as a contract by the Company with the public and with the landowners, whether the clauses under which the railway is to be made be in form imperative or permissive.

And the Court will enforce the performance by mandamus at the instance of one of the landowners :

Although the powers conferred upon the Company are temporary: And

Although the Company have taken no step, by issuing shares or otherwise, to carry the act into execution.

A mandamus, issued as above stated, called upon the Company immediately after receipt of the writ to do and take all necessary acts and steps, both as to the purchase of lands and otherwise, for making and completing, and to make and complete, the railway. The Company's act, referred to by the writ, estimated the expense of the works at a stated sum, and enacted that it should be lawful for them to raise a capital to that amount by creation of shares, and by mortgage. It did not appear by the mandamus that this had been done.

Held, nevertheless, that the requisition of the writ was proper, as it must be taken to imply that the Company should raise money by the means pointed out in the act, and it did not appear to be impossible or illegal that they should do so.

And (on demurrer) that a return, alleging merely that the Company had taken no step, either by purchase of lands or otherwise, for making the railway, was no answer. *Regina v. Lancashire and Yorkshire Railway Company*, 228.

See *Ante*, 2, *post*, 5.

4. Branch authorized by extension act : provision of capital.

Mandamus to a railway Company to make a branch authorized by an extension Act, which incorporated stat. 8 & 9 *Vict. c. 18*. Return: that the capital, required to make the branch, was not subscribed for by any contract, according to stat. 8 & 9 *Vict. c. 18. s. 16.*, and that the branch could not be made without the exercise of the compulsory powers to take land. On demurrer:

Held, that stat. 8 & 9 *Vict. c. 18. s. 16.* is not applicable to an extension Act, where the funds are to be furnished by the Company:

Held, also, that, even if stat. 8 & 9 *Vict. c. 18. s. 16.* were applicable, the return shewed no incapacity to obey the writ; as it did not aver that defendants were unable to procure the execution of the subscription contract.

It appeared on the record that the period for the exercise of the compulsory powers had expired, since the return and before the judgment.

Held, that a peremptory mandamus must be awarded, though, since the return, compliance had become impossible. *Regina v. Great Western Railway Company*, 253.

See *S. C.* in error, *post*, 5.

5. Special provisions shewing the power to be permissive.

Mandamus to make a line to *R.* It

appeared, on the record, that, after the making of the return but before the judgment of the Court below, the powers of the Company had expired. The Court of Queen's Bench, having held that, notwithstanding this, a peremptory mandamus should be awarded, the propriety of the decision on this point was questioned by the Judges in the Exchequer Chamber: but, the judgment was reversed on another ground: *ideo quare*.

In the special Act, it was enacted, that "it should be lawful for" defendants to make a line to *R.*, the line in question, "and if they shall think fit" a branch. And that the line to *R.* "shall commence at" &c., "and shall terminate at *R.*," and the branch, "if the same shall be constructed, shall be made" &c. In the Act was a power to lease the branch, with the powers for making it.

Held: that it was not obligatory on the Company to make the line to *R.*, the peculiar words of the special Act taking the case out of the general rule. *Great Western Railway Company v. The Queen*, 874.

6. Compliance illegal the statutory capital not having been subscribed.

Mandamus to complete a railway pursuant to an Act incorporating stat. 8 & 9 *Vict. c. 18*. Return, *inter alia*, that the undertaking was one to be carried into effect by means of a capital to be subscribed by the promoters, and that the capital had not been subscribed for under a contract, pursuant to stat. 8 & 9 *Vict. c. 18. s. 16.*, nor could the defendants then or at any time procure it to be so subscribed for. Plea, by way of estoppel, that defendants had taken the lands of a third party named, on part of the line, in exercise of the compulsory powers. Demurrer. Held, that the return was good, as it shewed that a compliance with the command in the writ, which would necessitate the exercise of the compulsory powers, would be illegal. Held, also, that the plea of estoppel was bad, as the matter disclosed by it was *res inter alios acta*. *Regina v. Ambergate &c. Railway Company*, 372.

COMPANY.

7. What return does not shew inability.

Mandamus to a railway Company to make a line, authorized by an Act. The time limited for the exercise of the compulsory powers for acquiring had expired. The writ contained a suggestion that the defendants had given notices, and made contracts, by virtue of which they were "either actually in possession of, or entitled to acquire, the fee simple in possession of, all the lands required for the purpose of constructing" the line. Return: That the defendants were not nor are "either actually in possession or entitled to acquire the fee simple or possession of all the land required for the purpose of constructing" the line.

Held: that the return was bad in substance, as, consistently with its truth, the defendants might have it in their power to purchase the part of which they were not possessed: and therefore that the return did not shew inability. *Regina v. Great Western Railway Company*, 774.

8. Effect of partial change by subsequent act, 178. *Ante*, 1.
9. Effect of impossibility, 178, 228, 253. *Ante*, 1, 3, 4, 5.
10. Effect of expiration of powers, 178, 228, 253. *Ante*, 1, 4, 5.
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I. Defence under the General Issue.

CONSTRUCTION.

Borough constable under municipal corporation's act.

Upon an issue joined on a plea of Non cepit in an action of replevin, defendant, under stat. 5 & 6 W. 4. c. 76. ss. 76. 133., may shew that he was a constable appointed for a borough under sect. 76., and took the goods within the county wherein the borough is situate, but without the borough, on a charge that they had been stolen.

Replevin lies for goods unlawfully taken: the remedy is not confined to the case of goods taken by way of distress. *Mellor v. Leather*, 619.

II. Places in which he may act.

1. Borough constable acting in county, 619. *Ante*, I.
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18. "Sale," 54. *Partition*, I. 1.
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20. "Shall be completed within five years," 858, 863. *Company*, VI. 2.
21. "Stranding," 456. *Insurance*, II.
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- I. Of process, 602. *Amendment*, I. 1. *App.* lxxxiii. 31.
- II. Of notice of trial or inquiry, *App.* ix. 34. 36.

CONTRACT.

- I. Alternative provisions, optional or contingent, to endeavour to procure employment or to pay a sum.

Declaration in assumpsit stated that, by agreement between defendant and plaintiff, after reciting that defendant had requested plaintiff to enter into defendant's employment in a manufacture, and that for that purpose plaintiff had agreed to leave his then employment on 1st *July* then next, "it was witnessed that the said parties thereto did mutually agree as follows :—" first, plaintiff agreed that he would serve defendant in such business for seven years at a salary of 100*l.* per annum, subject to the cessor of the salary and the determination of the agreement as after mentioned. Secondly, defendant agreed that he would, from and after 1st *July*, and during the continuance of the agreement, pay to plaintiff the salary by monthly payments; "and, if the said defendant should from any cause whatsoever give up the said business, or not require" plaintiff's "services, then that" defendant "would use his best endeavours to procure for the said plaintiff employment in some similar business, and for which he should receive a salary of not less than 100*l.* per annum; or in case" defendant "should be unable to do so, then the said defendant would pay to the said plaintiff the yearly sum of 100*l.* during the residue of the said term of seven years." That plaintiff had always performed and fulfilled all things on his part &c.

1st breach, That defendant, during the continuance of the term, refused to suffer plaintiff to continue in his employ, and then wrongfully dis-

charged plaintiff therefrom without reasonable or probable cause.

2d breach, That, although &c., (discharge as before), defendant did not use his best or any endeavours to procure, nor did he procure, plaintiff employment in some similar business for which he should receive a salary of not less than 100*l.* a year, but had wholly failed to find plaintiff such employment.

Held, that the 2d breach was well assigned : for that, by the agreement, it was not open to defendant, under the circumstances, to choose between using his best endeavours to find plaintiff the situation, and simply paying him 100*l.* per annum : but that he was bound to use his best endeavours &c. in the first instance, and could resort to the mere payment of salary only upon the failure of these endeavours.

That it was not necessary for plaintiff to aver a request by him to defendant to use his best endeavours &c.

That the general averment of performance, on general demurrer, amounted to an allegation that plaintiff was ready and willing to accept such situation.

That the language of the breach implied that a reasonable time for procuring such situation had elapsed.

Plea, as to 2d breach, that at the time when plaintiff was discharged as in the said breach mentioned, defendant was, "and thence hitherto has been, wholly unable to procure for the plaintiff any such employment as in the said agreement mentioned."

Held, on demurrer, that the plea was bad in substance, inasmuch as it raised an immaterial issue ; it being consistent with the plea that defendant had not used his best endeavours at all. *Rust v. Nottidge*, 99.

II. Statutory.

1. By obtaining act for execution of works of public utility, 178, 228. *Company*, VI. 1, 3. But see in Error, 858, 874. *Company*, VI. 2, 5.
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1. Effect of bankruptcy on the interests in a divisible contract, 66, 879. *Insurance*, I.
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V. Pleading.

1. Request, 99. *Ante*, I.
2. Readiness to perform, 99. *Ante*, I.
3. Reasonable time, 99. *Ante*, I. 111. *Company*, IV. 1.
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6. What must be specially pleaded. *App.* lxxx. 8. 12.

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1. Subscription contract, 253. *Company*, VI. 4.
2. In restraint of trade, 391. *Trade*, I. 1.

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Commission to, to take affidavits. *App.* xxv. 148.

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1. Though conviction bad on error, if not reversed.

Indictment for non-repair of a highway, against the inhabitants of the township of *H.*, averring them to be liable by prescription to repair such highways in the township as the inhabitants of the parish, but for the prescription, would have been liable to repair, with averment that the highway was in the township. Plea: Not guilty. The prosecutors gave in evidence a record of a presentment by a justice, under stat. 13 G. 3. c. 78., on his own view, that the road in question was out of repair; averring that it was in the township of *H.*, and that the inhabitants of that township ought to repair it: the record shewed a plea of Guilty by two inhabitants of the township of *H.*, a conviction before the Sessions, and a sentence of fine. Held that this conviction was conclusive evidence, against *H.*, that the road was in that township. And that, though the presentment might be bad on error for not shewing how the township was liable, the conviction, being before a competent tribunal and being unreversed, was not the less an estoppel. Held, also, that it was not necessary to shew that the fine had been levied, the conviction not being impeached on the ground of fraud or collusion.

By a local and personal act (since repealed) it was recited that the highway in question was in the township of *D.* Held, that the recital in the Act was not conclusive, and consequently did not open the estoppel. *Regina v. Haughton*, 501.

2. Though not shewn to have been followed by execution, 501. *Ante*, 1.
3. Not opened by recital in an act of Parliament, 501. *Ante*, 1.

II. How impeached.

On the ground of fraud or collusion, 501. *Ante*, I. 1.

III. Warrant in the nature of, 471. *Action*, IV.

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- I. Service of, 293. *Mandamus*, X.
- II. When presumed to be correct, 293. *Mandamus*, X.
- III. Whether return may be made upon, 293. *Mandamus*, X.
- IV. Costs of. *App.* lxxv. 2.

COPYHOLD.

I. Admittance.

1. New admittance when required on execution of a power in favour of the person already admitted.

By the custom of the manor of *T.*, containing copyholds of inheritance, when a copyholder in fee devises lands to such uses as *J. S.* shall appoint, and dies, and his death is presented, the lord, after three proclamations, may seize, until admission of the customary heir or some other person seeking admittance: and the heir or such other person may be admitted, to hold for the intents and purposes declared by the will, and under and subject to the powers contained in the will: and the heir or person so admitted pays the same fine as upon an admittance to a fee simple: and, when, after such admission, *J. S.* appoints, and the instrument of appointment is enrolled, the appointee is admitted, whether or not there has been any other admittance before enrolment.

Held that, although the person admitted before execution of the power be himself the heir, and the power be afterwards executed in his favour, he must, after the execution of the power, be admitted again, and pay a fine, before he can surrender the estate.

For that, immediately on the execution of the power, the effect of the first admittance expires, and there is a vacancy on the roll. *Regina v. Corbett*, 836.

2. Admittance subject to powers of appointment contained in a will, 836. *Ante*, 1.
3. Expiration of admittance, 836. *Ante*, 1.

II. Mandamus to admit to : copyholds pleading.

Plea bad which would not support a peremptory mandamus.

Mandamus to lord and steward of a manor. The writ suggested that the manor contained copyholds descendable to heirs as of the hereditary right; that *T.*, the maternal uncle of *P.*, was admitted to a copyhold to hold to him and his heirs, according to the custom, and died seised thereof and intestate; that the copyhold descended to *P.*, as heiress, at law and according to the custom, of *T.*; and that *P.*, having become entitled to an estate of inheritance therein from *T.*'s death, had demanded admittance, which was refused; and the writ commanded the defendants to admit.

Return: that the copyhold did not descend to *P.*, as heiress, at law and according to the custom, of *T.*; that *P.* is a stranger in blood to *T.*; and is not and never was entitled to the estates and hereditaments.

Pleas: 1. That the copyhold did descend to *P.*, as heiress, at law and according to the custom, of *T.*; 2. That *P.* was not nor is a stranger in blood to *T.*; 3. That *P.* was, on the death of *T.*, entitled to the estates and hereditaments: all concluding to the country.

On demurrer to the 2nd plea, held: That the plea was bad; for that it must be taken by itself, and, so taken, was no answer to the return, inasmuch as, if it were found for the prosecutrix, it would not support a peremptory mandamus. *Regina v. Dendy*, 829.

III. Limited inspection of court rolls by copyholder. *App.* ix. 31.

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Protection of registered designs, 439. *Design.*

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I. Of prosecution: certiorari.

1. Who not a prosecutor entitled to, 597. *Certiorari*, II. 1.
2. Where expenses defrayed by subscription. *Regina v. Cook*, 599 n.

II. Of appeal.

To whom to be adjudicated, 810. *Certiorari*, I. 2.

III. Errors in respect of.

1. How corrected. *App.* lxxxiii. 27.
2. When mere form, 810. *Certiorari*, I. 2.

IV. Signed bill, 26. *Attorney*, I. 1. *App.* lxvi. 9.

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1. On writ of summons specially indorsed. *App.* ii. 1.
2. Security for costs; time of application. *App.* vi. 22.
3. On payment into Court. *App.* iv. 12. 13.
4. Set-off: attorney's lien. *App.* xiii. 63.
5. Where several matters are improperly pleaded. *App.* lxxix. 3.
6. On discharge of rule to set aside proceedings for irregularity. *App.* xxiv. 137.
7. Of making order a rule of Court. *App.* xxvi. 159.
8. Of proof and copies of documents. *App.* viii. 30. lxxv. 2.
9. Of the day. *App.* x. 39.
10. Of the first trial. *App.* xii. 54.
11. Of several issues. *App.* xiii. 62.
12. Of judgment, cognovit, or Judge's order. *App.* lxxv. 5.
13. In ejectment. *App.* lxxxiii. 29. 30.

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14. In error. *App.* lxxxii. 25.
15. Fees to counsel or pleader. *App.* lxv. 3. 4. 6.
16. In agency cases. *App.* lxxvi.
17. Taxation. *App.* xiii. 59.—61. xxviii. 167.
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19. Attachment for non payment. *App.* xxviii. 168.

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- I. Appearance by, 489. *Appearance*, I.
- II. Whether he may give evidence, 11. *Advocate*.
- III. Allowance of fees in costs. *App.* lxv. 3. 4. 6.

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Of notice of trial or inquiry. *App.* ix. 34. 37.

Borough constable acting in, 619. *Constable*, I.

COUNTY.

Borough constable acting in, 619. *Constable*, I.

COUNTY COURT.

- I. Jurisdiction: personal actions: title in question.

1. Action given by a local act in one of the superior Courts.

By stat. 1 & 2 *Vict. c.* xxxiii. (local and personal, public) s. 18, a paving rate may be imposed on the occupiers of premises in *B.* in the county of *C.*; and, in case of nonpayment, "the same shall be levied by distress and sale of the goods and chattels of such occupier," "or shall be and may be sued for and recovered, together with full costs of suit, in any of her Majesty's Courts of record at *Westminster*."

On motion for a prohibition in a

COUNTY COURT.

cvil

plaint brought to recover 8*l.* 10*s.* 8*d.* for such a rate in the county Court of *C.*:

Held that, though the action given by stat. 1 & 2 *Vict. c.* xxxiii. was only in the Superior courts, it was a plea of personal action within stat. 9 & 10 *Vict. c.* 96. s. 58.; and the county court had jurisdiction to try the plaint. *Re Stuart v. Jones*, 22.

2. Title in question: toll.

Stat. 32 *G. 3. c.* 74. authorizes trustees to take a tonnage rate on each ship passing *Ramegate*, and not producing a receipt testifying the payment before on that voyage. The owners of a ship, bound on a voyage out, and home, having been compelled to pay two sets of rates, due on two voyages, as if the voyage out and that home had been separate voyages, brought a plaint in the county court to recover the amount last paid. They admitted that the trustees were entitled to a rate on each voyage, but alleged that the voyage out and home was one voyage. On a rule for a prohibition:

Held, That the rates were "toll" within stat. 9 & 10 *Vict. c.* 95. s. 58., and that the "title" to the toll was in question in the plaint, and the county court had no jurisdiction. Rule absolute for a prohibition. *Regina v. Everett*, 273.

3. Title in question: expiration of plaintiff's title as landlord.

A plaint was brought in a county court for use and occupation. It appeared that plaintiff demised the premises to defendant for a year from *Michaelmas* 1850, and defendant occupied from that date up to the time of the trial. Defendant paid the rent to plaintiff, for the half year up to *Lady* day 1851, but refused to pay rent afterwards. It was proved that *J.*, claiming to be plaintiff's landlord, had given plaintiff notice to quit, expiring at *Lady* day 1851, and ordered the defendant not to pay plaintiff rent after that day; and that plaintiff and *C.*, a deceased occupant of the premises in question, had paid 10*s.* rent

II. Excessive.

Rule for new trial, without abandoning bill of exceptions, 360. *Execution*, I. 1.

III. Unliquidated.

Partial loss on a valued policy, 66. *Insurance*, I. 1.

IV. Interest on. *App.* xv. 77.

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I. Amendment of erroneous, 602. *Amendment*, I. 1.

II. Of rule of Court. *App.* xxv. 149.

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1. Materiality and construction of allegation of period for which rent is claimed, 415. *Time*, I. 1.
2. Plea of payment when not necessary, 415. *Time*, I. 1.

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I. General form when sufficient.

For diversion of water, 665. *Water*, I.

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2. Striking out unnecessary allegations, 397 n. *Demurrer*, I.

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1. For nonpayment of monies pursuant to statute, 81. *Action*, II. 1.
2. On contract to pay for services and use best endeavours to procure a situation, or to pay a sum, 99. *Contract*, I.
3. By husband and wife, on account stated, 659. *Baron and Feme*, II.
4. On a covenant in restriction of trade, 391. *Trade*, I. 1.
5. In covenant, by reversioner against assignee of lease of copyholds, 164. *Mortgage*, I.
6. On surety bond given to secure due accounting by borough treasurer, 295. *Surety*, II. 1.
7. For infringing copyright in registered paper hangings, 439. *Design*.
8. Against railway company for neglect to register transfer, and for illegal forfeiture of shares, 111. *Company*, IV. 1.
9. For wrongful removal of fixtures, 674. *Deed*, I.

IV. Rules and regulations.

1. Declaration when unnecessary. *App.* lxv. 5.
2. Several counts on same cause of action. *App.* lxxviii. 1. 3.
3. No side bar rule for time to declare. *App.* iii. 7.

V. In evidence. *Evidence*, X.

DEED.

I. Estoppel of parties to.

Tenant joining, in a different capacity, in conveyance of land and fixtures.

Trustees, seised under a devise in fee of a farm, leased to defendant, one of themselves, for a term, and after-

wards, in the character of trustees only, conveyed the land to plaintiff in fee, with all fixtures: Held that defendant, being a party to the conveyance, could not, after the conveyance, under the general law or the custom of the country, remove, at the expiration of his term, farm machinery annexed to the land.

And that he was therefore liable to plaintiff, who had demised to *M.*, in case for injury to the reversion, for removing staddles built into the land for the purpose of supporting ricks, and a threshing machine attached by bolts and screws to pillars fixed in the land, assuming that he might have removed them if they had been placed there by himself and he had not joined in the conveyance.

That a granary, resting by its mere weight on staddles built into the land, was a chattel, and would not be a fixture, in the ordinary sense of the word, though it might pass by that word if, from the rest of the conveyance, an intention appeared of comprehending farm machinery in general. But that, even then, plaintiff could not recover against defendant for carrying it away, either as for an injury to the reversion in the land, the chattel not being part of such reversion, or in trover, *M.* being entitled to the exclusive possession of the chattel. *Wiltshire v. Cotterell*, 674.

II. Consideration.

What not regarded as antecedent,
15. *Bankrupt*, I. 1.

III. Stamp.

Omission of part of purchase money,
64. *Partition*, I. 1.

IV. Loss.

Signature of deceased attesting witness, 642. *Evidence*, IV.

V. Inspection.

Who has such an interest in as to be entitled to inspection, 279. *Evidence*, I.

DEFAMATION.

I. Justification in criminal proceedings.

1. Previous publication not proceeded against.

Where a new trial is to be moved for by the defendant in a criminal case, intimation must be given to the Court, during the first four days of term, that the party is prepared to move.

Where, to a criminal information for a libel, defendant has justified, under stat. 6 & 7 *Vict. c. 96. s. 6.*, asserting the truth of the imputations contained in the alleged libel, it is not competent to him to prove, in support of the plea, that the same charges were previously published in another publication, and that the prosecutor had taken no steps against such other publication. *Regina v. Newman*, 268.

2. Entry of verdict on failure of proof as to part.

Where a justification is pleaded, under stat. 6 & 7 *Vict. c. 96. s. 6.*, to an indictment for a defamatory libel, and the libel contains several distinct imputations, and the plea alleges the truth of all and is traversed generally, if the evidence fails as to any one of them the verdict will be entered generally against the defendant.

Therefore, where, upon the trial of an issue upon a plea justifying the whole of such a libel, evidence was offered in support of some only of the imputations, and the jury found that one only of the imputations upon which evidence was offered was proved, the verdict was entered up for the Crown on that issue generally; and the Court refused to grant a new trial on the ground that the finding as to the other issues upon which evidence was offered was against the weight of evidence.

Where the defendant, having pleaded such a plea, is convicted, the Court, in apportioning punishment, looks into the evidence given at the trial, for the purpose of considering whether the guilt of the defendant is

aggravated or mitigated by the plea and the evidence.

In such a case the defendant may, in mitigation of punishment, shew by affidavit that, after the publication, but before plea pleaded, information was given to him which, if true, would have supported an allegation in the plea, evidence having been given, at the trial, to account for the non-production of proof, but no evidence in support of the allegation itself.

But, where a document, which would have supported the plea, has been rejected at the trial for want of authentication by the place of custody or otherwise, its contents are not admissible in confirmation of the defendant's own affidavit that such a document was communicated to him before plea pleaded. *Regina v. Newman*, 558.

3. New trial refused where verdict against evidence only as to part, 558. *Ante*, 2.

4. Apportionment of punishment, 558. *Ante*, 2.

5. What may be shewn in mitigation, 558. *Ante*, 2.

6. Practice on motion for new trial, 268. *Ante*, 1.

II. Criminal proceeding; jurisdiction of justices.

Requiring sureties for good behaviour, 471. *Action*, IV.

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DEMAND.

Particulars of demand. *Particulars*.

DEMURRER.

I. Setting aside as frivolous.

To immaterial traverse; election as to striking out allegation.

DESIGN.

It is not a general rule of practice that, where the plea traverses an allegation in the declaration and the plaintiff demurs to the plea, he will be put to his election whether the demurrer shall be set aside as frivolous or the allegation be struck out: though this will be done if the plaintiff's pleading appear to be so framed as to entrap or unfairly perplex the defendant.

So held, before stat. 15 & 16 *Vict.* c. 76. *Tallis v. Tallis*, 397 n.

II. Rules and regulations. *App.* iii. 8. iv. 14.—17. x. 40.

DENIAL.

Pleas in. *App.* lxxix. 6. 7. 10. 11. 15. 16. 19. 20.

DEPOSIT.

Proper place of, 93. *Poor*, IV. 1.

DESCRIPTION.

Such as to be commonly understood, 600. *Municipal Corporation*, III. 1.

DESIGN.

Protection of registered designs.

Lost by publication of unmarked patterns.

The proprietor of a design applied to paper hangings, registered according to the provisions of stat. 5 & 6 *Vict.* c. 100., published pattern pieces, containing the whole design, not bearing the letters "Rd" and the proper number, as prescribed by sect. 4: the ordinary practice in the trade was to sell hangings in larger pieces, but to mark patterns such as those which were published. Held, that he was not protected by the Act against parties copying the design from such pattern pieces, and publishing articles with such design applied to them.

Per Lord Campbell C. J. and Wightman J. Dissentiente Coleridge J. *Heywood v. Potter*, 439.

DETINUE.

Plea of non detinet. *App.* lxxxi. 15.

DEVISE.

1. Revocation by codicil.

General words in codicil explained by reference to the will.

E., being seised in fee of tithes and also of lands, devised the tithes to his nephew *D.*, son of *H.*'s sister *A.*, for life; but, if *D.* should receive ecclesiastical promotion to a certain amount, then to *D.*'s brother *W.* for life; remainder to the uses expressed concerning his real estate. He made certain pictures &c. heir looms, directing the inventory thereof to be deposited with the deeds concerning his "real estate." He devised all his "real estate, of what nature or kind soever, and wheresoever situate," to his niece *M.* for life, remainder to her sons successively in tail, remainder to *W.* for life, remainder to his sons in tail, remainder over to other nephews in like manner. He bequeathed a legacy to his wife, on condition of her executing a deed binding her to receive an annuity from the person who should for the time being be in the possession of his "real estate, under the limitation aforesaid," in lieu of her taking possession of the hereditaments settled on her by way of jointure.

He executed two codicils, in which he changed the order of the parties named in the disposition of his will to succeed in the entail of his "estates real and personal;" and he declared "all the estates left and disposed of by my will," to be without impeachment of waste, with power to cut timber for repairs of "buildings on the estate."

By another codicil, he devised all his "real estates, of what nature or kind soever," to *H.*, son of *M.*, in strict settlement, and, upon failure of *H.*'s issue, devised all his "said real estates" as "mentioned in my said will," declaring that the devises in the codicil were to take effect "in prece-

dence to the devises of my real estate contained in my said will;" and he appointed *D.* one of his residuary legatees.

Held that tithes were not, in the will, included under the words real estate, and that the specific devise of them therefore took effect. Also, that this specific devise was not revoked by the codicil last mentioned, the words "real estate" appearing to be there used so as not to include tithes. *Williams v. Evans*, 727.

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"Real estate" construed so as not to include tithes, 727. *Ante*, I.

2. General words; how far controlled by specific devise, 727. *Ante*, I.

III. Of copyholds; admittance, 836. *Copyhold*, I. 1.

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Postponed to simple contract debts.

The executor of a deceased incumbent is bound to satisfy simple contract debts before paying for dilapidations by the testator.

Therefore, in a suit on the custom of England for dilapidations, by the successor of a deceased incumbent against the executor, it is a good plea that, since the commencement of the suit, defendant has paid simple contract debts, leaving no assets to be administered. *Bryan v. Clay*, 38.

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To masters of the Courts. *App.* lxxv. lxxvi.

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III. Form of notice to admit documents. *App.* vii. 29.

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II. Water rights. *Water*.

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1. Judgment for want of appearance or defence. *App.* xxi. 112.

2. Appearance by person not named as defendant. *App.* xxi. 113.

3. Verdict for plaintiff where defendant does not appear. *App.* xxi. 114.

4. Nonsuit of plaintiff. *App.* lxxxiii. 29.

5. Nonappearance of defendant. *App.* lxxxiii. 30.

6. Writs of execution in. *App.* liii. 23.—25.

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II. Objections.

1. Misnomer of voter, 704. *Municipal Corporation*, III. 2.

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1. Defects in indictments that are still bad in error, 553. *Indictment*, II.

2. In misdemeanour: list of recognizances. *Reg. Gen.* 693.

III. Rules and regulations.

1. Error in fact. *App.* xiii. 64.—69.

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3. Costs. *App.* xiv. 69.

4. Stay of proceedings pending error. *App.* xxi. 110.

5. Bail in. *Bail in Error*.

6. Award of repleader &c. *App.* lxxxii. 24.

7. Costs in. *App.* lxxxii. 25.

8. Interest in. *App.* lxxxiii. 26.

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1. By previous conviction unreversed, though erroneous on the face of it, 501. *Conviction*, I. 1.
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4. Of tenant from disputing landlord's title; expiration as to part, 630. *County Court*, I. 3.
5. By judgment on appeal against former order, 583. *Poor*, VIII. 1.
6. Of party to a conveyance, 674. *Deed*, I.

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I. Admissions: generally.

Tacit admissions by arguing upon a statement without disputing it.

Ejectment for a house. The tenant in possession took out a summons to inspect two leases. No affidavits were used before the Judge; but it was stated, for the tenant, that he was in possession as a lawful occupant of the house, and that the lessors of the plaintiff, who were owners of the reversions expectant on two leases, comprising a considerable district of which the premises were part, sought to recover on the ground that they had a right of entry for breaches of covenants alleged to be contained in the leases which the tenant sought to inspect. The attorney for the lessors of the plaintiff, without either denying or in terms admitting the statement, argued that the Judge had no authority to make an order to inspect.

The Judge made the order, on the assumption that the statement, not being disputed, was admitted to be true in fact. On a motion for a rule to set aside this order.

Held: 1st. That the affidavits must disclose what were the admissions before the Judge on which he made his order.

2d. That the order was properly made in exercise of the common law powers of the Court; the tenant appearing, by the tacit admissions before the Judge, to have an interest in the deeds which he sought to inspect. *Doe dem. Child v. Roe*, 279.

II. Admission of documents.

1. Form of notice to admit. *App.* vii. 29.
2. In what cases: consequences of omission. *App.* viii. 30.

III. Inspection of documents. *Inspection*.

IV. Attesting witness.

Deceased attesting witness to lost deed.

On the trial of an appeal at sessions, a witness proved the contents of a lost deed, and its execution by the parties. He stated, on cross examination, that the name of *B.* was written opposite to the names of the parties; that he knew *B.*, who was dead; but that witness did not know *B.*'s handwriting. The Sessions found that *B.* was the attesting witness, and, because there was no evidence of his handwriting, rejected the secondary evidence. On a case stating the above facts:

Held: that, the Sessions having found as a fact the identity of the attesting witness and the deceased man, further evidence of handwriting was not required. *Regina v. St. Giles, Cumberwell*, 642.

V. Documentary: original records.

Restriction as to subpoenas to produce. *App.* ix. 32.

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1. Handwriting of deceased attesting witness, 642. *Ante*, IV.
2. Proper place of deposit, 93. *Poor*, IV. 1.
3. Finality of decision on such points, 93. *Poor*, IV. 1.
4. What person need not be called as a witness, 93. *Poor*, IV. 1.

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1. Of person to whom a document is traced, 93. *Poor*, IV. 1.
2. Of party in his own favour, when evidence for him, 471. *Action*, IV.
3. Of deceased tenant as to what he paid rent for, 630. *County Court*, I. 3.

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Irrelevancy of previous publications by other persons, 268. *Defamation*, I. 1.

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Money paid for equality of, 54. *Partition*, I. 1.

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1. Good, though seizure irregular.

Trespass against the sheriff and *S.* for breaking a house and taking goods. Plea by *S.*, severing in his pleadings from sheriff, alleging a writ of *fi. fa.* directed to the sheriff, a warrant by the sheriff to *S.* as bailiff, and justification as bailiff. Replication, alleging a prior warrant to *J.* as bailiff, a seizure by *J.* under the writ, and payment by plaintiff to the sheriff in satisfaction of the writ, before the warrant to *S.* Rejoinder, traversing the prior seizure under the writ, and the payment to the sheriff.

On the trial, the sheriff and *S.* appeared by different counsel. It appeared that the sheriff made a warrant to *J.*; that *J.* sent *L.*, his general manager, to execute it, and *L.* entered the plaintiff's house and seized his goods. Plaintiff sent to the office of the bailiff *J.*, and there paid the amount to *L.*, who, in *J.*'s name, withdrew the man in possession, and sent notice to the execution creditor that the money was ready. In the course of the same day *J.* died; and the money was not found. The sheriff, knowing the facts, made a fresh warrant to *S.* who seized plaintiff's goods and held them for several days. The jury did not agree as to whether *L.* actually paid the money to *J.* before his death; but they found that *L.* was authorized by *J.* to execute the warrant, and to receive the money. The Judge ruled that the jury might find for the plaintiff. The counsel for the sheriff excepted. The counsel for *S.* did not. The jury assessed the damages at 400*l.*

The counsel for the sheriff moved for a new trial, on the ground that the damages were excessive. Held, that he might do so without abandon-

ing the bill of exceptions, as this was a point which could not have been included in it; but that the jury were justified in giving vindictive damages in such a case against the sheriff; and the rule was refused.

The counsel for *S.* moved for a new trial, on the ground of misdirection and that the damages were excessive as against *S.* Held, that there was sufficient evidence of a payment to *J.* the bailiff, under an execution *de facto*; and that, assuming the seizure by *L.* in *J.*'s absence to be irregular, still the payment was good: and the rule, on the ground of misdirection, was refused.

But held that the damages were excessive as against *S.* alone; and a rule nisi was granted to raise the question what is the measure of damages as against joint wrongdoers, one of whom has acted under aggravating circumstances not affecting the other. An arrangement having been made, this rule dropped; and the question was not further discussed. *Ideo quære. Gregory v. Slowman*, 360.

2. Where a statute forbids preference amongst creditors, 74. *Bond*, I.

3. To bailiff's manager in his absence, 360. *Ante*, I. 1.

4. Damages for second execution after, 360. *Ante*, I.

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By bailiff's general manager, 360. *Ante*, I. 1.

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1. Generally. *App.* xiv. 70.—73. 76. 77.

2. After verdict or nonsuit. *App.* xii. 57.

3. Of bailable process. *App.* xvi. 81.

4. *Capias ad satisfaciendum*: for out-lawry, or to *fix* bail: teste and return. *App.* xv. 74. 75.

6. *Capias ad satisfaciendum*: forms. *App.* xlviii. 15.—22.

6. *Elegit*: forms. *App.* xl. 9.—14.

7. *Habere Facias*: forms. *App.* liii. 23. 24.

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II. Of compulsory powers, 178. 253. 858. 874. *Company*, VI.

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1. When not an injury to the reversion, 674. *Deed*, I.

2. Who can, and who cannot, sue for, 674. *Deed*, I.

3. Form of declaration, 674. *Deed*, I.

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I. By breach of condition subsequent, 310. *Charter*, I. 1.

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I. Defects in form.

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II. Statutory.

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I. Impeaching conviction on the ground of, 501. *Conviction*, I. 1.

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I. Unlawful.

Dominoes not an unlawful game.

Stat. 9 G. 4. c. 61. s. 21. subjects persons licensed under that Act to a penalty, on conviction before justices, for any offence against the tenor of the license: the license (Schedule C.) provides that the person licensed "do not knowingly suffer any unlawful
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games or any gaming whatsoever" in the inn, &c.

An information charged the person licensed, that he did "knowingly suffer a certain unlawful game, to wit the game of Dominoes, to be played" in his house.

Held, That the information charged no offence within the section: and, the party having been convicted, the Court granted a certiorari to remove the conviction. *Regina v. Ashton*, 286.

II. Lawful.

Right to remove intruder, 782.
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GAOL.

Duties of justices and council as to borough gaols.

The justices of the borough of Y. appointed R. keeper of the gaol in that borough, at a salary of 120*l.* a year, and made an order on the treasurer of the borough to pay him his salary. The town council refused to confirm this order, on the ground that they considered the salary excessive. On a rule for a mandamus commanding them to confirm the order:

Held: that the duty of the council, under stat. 7 W. 4 & 1 Vict. c. 78. s. 38., was not merely ministerial, to confirm such orders as were made by the justices; but that they had a discretion, to approve or disapprove of the order sent to them: and the rule for a mandamus was discharged. *Regina v. York, Mayor &c.*, 588.

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- I. In replevin, 619. *Constable*, I.
- II. Defence open to constable under, 619. *Constable*, I.
- III. Effect of under new rules. *App.* lxxix. 6. 7. 10. 11. 15. 16. 19. 20.
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Ejectment, by a mortgagee of turnpike tolls &c., brought under stat. 3

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G. 4. c. 126. s. 49., to recover possession of the tollgates &c. After the commencement of the ejectment, another ejectment on the demise (laid earlier than that in the first action) of another mortgagee was commenced. Judgment went by default in the second ejectment; and before the trial the sheriff gave the lessor of the plaintiff in the second ejectment possession under a writ of habere facias possessionem. Held, that the lessor of the plaintiff, who had commenced his ejectment first, was entitled to the verdict. *Quere*, Whether he would be entitled to issue a writ to obtain possession. *Doe dem. Butt v. Rous*, 419.

II. Locality.

Conclusive evidence of, 501. *Conviction*, I. 1.

III. Liability to repair : evidence.

Estoppel by previous conviction not reversed, though not followed by execution, 501. *Conviction*, I. 1.

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II. By reason of non-subscription of capital, 372. *Company*, VI. 6.

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I. Indictable offence, generally.

1. Commencement of a misdemeanour.

It is a misdemeanour to procure indecent prints with intent to publish them.

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But to preserve and keep them in possession with such intent is not a misdemeanour. *Dugdale v. The Queen*, 435.

2. Intent without act done not indictable, 435. *Ante*, 1.

II. Statement of property in goods.

When necessary.

An indictment for obtaining goods by false pretences is bad on error if it does not state to whom the goods belonged. The defect is not cured by stat. 14 & 15 *Vict. c.* 100. *Sill v. The Queen*, 553.

III. Defects cured by statute.

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I. Nature of contract.

1. Divisibility of contract to indemnify from contract to return part of premium.

Assumpsit, to recover a partial loss on a valued policy of insurance on goods on a voyage to a market; premium 60s. per cent., to return 23s. 9d. if landed in the *United Kingdom*:

Plea 1: Set-off for premiums. Demurrer.

Held, a bad plea, as the action was for unliquidated damages.

Plea 2: Bankruptcy of plaintiff before action. Replication: A transfer of the goods, and an assignment of the contract of insurance to *F.*, before the bankruptcy, with an averment that plaintiff sued as trustee for *F.* Rejoinder: That the goods were landed in the *United Kingdom*; and that the right to have a return of premium was not transferred from plaintiff before bankruptcy. Demurrer.

Held: That the rejoinder was bad; as, though the right to recover back the premium passed to the assignees, it was severable from the right to recover on the contract of indemnity; and therefore defendant could not insist that the assignees, having an interest in part of the contract, had the interest in the whole. *Castelli v. Boddington*, 66. See *S. C.* in error, *post*, 2.

2. Divisibility of the contracts.

Assumpsit to recover a partial loss on a valued policy of insurance on goods on a voyage to a market; premium 60 per cent., to return 23s. 9d. if landed in the *United Kingdom*.

Plea 1: Set-off for premiums. Demurrer. Held by the Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, a bad plea.

Plea 2. Bankruptcy of plaintiff before action. Replication. A transfer of the goods, and an assignment of the contract of insurance, to *F.*, before the bankruptcy, with an averment that plaintiff sued as trustee for *F.* Rejoinder: that the risk ended in the *United Kingdom* before bankruptcy; and that the right to have a return of premium was not transferred from plaintiff before bankruptcy. Demurrer.

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that, the causes of action being both vested in the plaintiff before bankruptcy, and being such that distinct actions might have been brought by him whilst sui juris, the plaintiff was entitled to sue in his own name as trustee for that cause of action in which he had no beneficial interest at the time of his bankruptcy.

Per *Jervis C. J.*, *Cresswell and Williams Js.*, *Parke*, *Platt* and *Martin Bs.*; dubitante *Pollock C. B.*, it would have been otherwise had the plaintiff then had any beneficial interest, however small, in the cause of action itself. *Boddington v. Castelli*, 879.

II. Usual memorandum as to average.

What is a stranding.

A cargo of barley insured, subject to the usual memorandum, sustained an average loss. The ship sailed from *Nantes* to *Dublin*: by stress of weather she was driven into the bay of *Palais* on the North of *France*, where she anchored. The wind increasing, the anchor dragged: and, for the preservation of all on board, the captain slipped the chains, got the ship under sail, and succeeded in entering *Sanzon*, which is a tidal harbour; where, by reason of its being then low water, the ship took the ground. On a case stating these facts, and raising the question whether the ship was stranded: Held: that she was stranded within the meaning of the memorandum, as she had not taken the ground in the ordinary course of management in a tidal harbour, but from an unusual state of things. *Corcoran v. Gurney*, 456.

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3. In error. *App.* lxxxiii. 26.

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II. Waiver.

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Sale of supposed wife's goods by supposed husband with her assent.

A., a widow, married *B.*, whom she believed to be a single man. *A.* was not the personal representative of her deceased husband; but she was possessed of furniture which had been his property, and which, after her marriage with *B.*, continued in the house in which *B.* and *A.* lived. *B.* sold and delivered those goods to *C.*, with *A.*'s concurrence, and *C.* paid *B.* for them. After this it was discovered that *B.* was a married man, and that his marriage with *A.* was void. This was unknown either to *A.* or *C.* till after the sale. *A.* sued *C.* in the county court for the value of the goods.

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Held, on appeal, that, the property being in the personal representative of her deceased husband, *A.* could not maintain an action against any one but as wrongdoer; and that, as *C.* had taken the goods with *A.*'s concurrence, he was not a wrongdoer as against her.

And that, even on the supposition that the goods belonged to her, *A.* had constituted *B.* her agent to sell, and could not dispute the sale made by him as her agent to an innocent party. *Weller v. Drakeford*, 749.

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II. Vacation Master. *App.* lxx. 1.

III. His office.

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IV. Ignorantia legis excusat neminem, 1. *Bail*, I.

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I. What is.

Assignment of leasehold to indemnify surety.

A deed, between *B.* and *R.*, recited that *B.* and *R.* had become jointly and severally bound to *W.* in 2000*l.*, by bond conditioned for payment by them of 1000*l.* and interest on a day named, and that *R.* executed the bond at the request of and as surety for *B.*, on *B.* agreeing to indemnify *R.* by assignment of the estate and effects of *B.*, and on *B.* entering into covenants as thereafter contained: and the indenture witnessed that, in pursuance of the agreement and of *R.* having so joined as surety, and of ten shillings, *B.*, by way of underlease, demised leasehold premises to *R.* The deed contained a declaration that the premises were underleased for the purpose of keeping *R.* indemnified from liability and loss which might occur to him from having so become surety; and a proviso that, if *B.* should pay the principal sum and interest, and keep *R.* indemnified, those presents should be void: nevertheless that, if *R.*, as surety, should bear any loss or pay any money, *R.* might levy and raise such money, loss, &c., as he should pay, sustain, &c., with interest, by rent from the premises, or mortgage, or sale. *R.* covenanted, in case the moneys due on the bond should

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be paid by *B.* without calling on *R.*, that *R.*, on the bond being delivered to him to be cancelled, would reassign the premises. *B.* covenanted to indemnify *R.* against the bond.

Held, that this deed required a mortgage stamp, under stat. 55 *G.* 3. c. 184., Schedule, part I., tit. *Mortgage*. *Lord Canning v. Raper*, 164.

II. Stamp.

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Objection to retention of name: form of notice.

A burgess objected to the name of *J. B.* of *A.* being retained on the burgess list for the borough of *H.* He had given notice of the objection to the town clerk in the precise form given in No. 3, Schedule (D.) to stat. 5 & 6 *W.* 4. c. 76. The notice delivered to the person objected to was "To Mr. *J. B.* I hereby give you notice that I object to *your name* being retained," &c. The mayor and assessors refused to hear the objection, on the ground that this latter notice was insufficient. Held, that the notice was to the like effect with the form No. 3, Schedule (D.), and that the objection ought to have been heard. *Regina v. Harwich, Mayor, &c.*, 617.

II. Burgess roll.

Misnomer, 704. *Post*, III. 2.

III. Election of councillors.

1. Voting paper: description of qualification.

At a municipal election, a voting

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ticket signed 'W. J. of K. Street' was rejected, on the ground that the qualification of W. J. on the burgess roll was described as 'House in M. Street.' It was shewn by affidavits that K. Street and M. Street intersect; that the house in question was the corner house; that it was one house, with a street door in each street, consisting of what had formerly been two distinct houses, one in each street, and one of them being the house in M. Street. Held: that the description was such as to be commonly understood within the meaning of stat. 5 & 6 W. 4. c. 76. s. 142., and that the vote was improperly rejected. *Regina v. Gregory*, 600.

2. Right to vote notwithstanding misnomer.

Joseph C., a person entitled to vote at municipal elections, was, by mistake, entered on the burgess roll as *James C.* He voted by the name of *James C.* On motion for quo warranto, the vote was objected to, in the rule, on the ground that *C.* was not entitled to vote, and had fraudulently personated a person entitled to vote.

Held, that neither objection was sustained.

And *semble* that, if the objection in the rule had been that *C.* had voted by a wrong name, and was not rightly entered in the burgess roll, this objection could not have been sustained, but that the misnomer would have been cured under sect. 142 of stat. 5 & 6 W. 4. c. 76. *Regina v. Thwaites*, 704.

3. Personation: what is not, 704. *Ante*, 2.

4. Bribery, in *Regina v. Thwaites*, 705 n.

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1. Not where issue must still be found the same way, 558. *Defamation*, I. 2.
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- III. By direction of Court of error. *App.* lxxxii. 24.
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- I. Officers.
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- Of person as plaintiff.
- Practice on amendment, *App.* iii. 6.

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- III. Of chargeability, 711. *Poor*, VII.
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- I. Change in tenure, 295. *Surety*, II. 1.
- II. Master's. *Master*, III.

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- I. Generally.
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I. Delivery of.

1. Delivery with declaration after indorsement on summons.

Quere, whether, where the writ of summons in an action is indorsed with particulars under sect. 25 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76.), the plaintiff,

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without leave of a Judge, may deliver fresh particulars with the declaration, and proceed thereon.

At any rate, such a proceeding is no more than an irregularity which is cured by the defendant pleading over. *Fromant v. Ashley*, 723.

2. What a mere irregularity, 723. *Ante*, 1.

II. Rules and regulations. *App.* V. 19.—21. lxxi. 13.

III. Of claim: amendment, 383. *County Court*, I. 5.

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I. Price to be paid for equality of partition.

1. Recoverable though not expressed in conveyance.

Debt on bond. Plea: that it was given to secure the payment of 660*l.* and interest agreed, after the passing of stat. 55 G. 3. c. 184., to be paid for equality of partition of certain lands in which plaintiff and defendant were interested; and that on the principal deed, by which plaintiff conveyed to defendant her interest in the estate taken in severalty by defendant, no mention was made of this sum. On demurrer:

Held: That stat. 48 G. 3. c. 149. s. 24. (incorporated by stat. 55 G. 3. c. 184. s. 8.) applied only to sales properly so called; and that an exchange upon which money was paid for equality of partition was not a sale. And, therefore, that the enactment in that section, enabling the purchaser to recover from the seller any part of the purchase money not expressed in the deed of sale, was inapplicable.

Held, also, that, though the deed ought to have been stamped with an ad valorem stamp as an exchange, the improper stamping of the conveyance was no bar to an action on the bond given to secure the price. *Henniker v. Henniker*, 54.

2. Money given for equality of exchange, 54. *Ante*, 1.

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3. Wherein it differs from a sale, 54. *Ante*, 1.

II. Stamp.

Price recoverable though conveyance insufficiently stamped, 54. *Ante*, 1. 1.

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PATENT.

I. Specification.

Object not unequivocally shewn.

A specification in a patent, for a particular construction of windlasses, stated that the object was "to hold, without slipping, a chain cable of any size." Before the date of the patent, constructions were known by which a windlass might be made to hold a single chain cable of any assigned size.

Held: that the specification did not unequivocally shew that the object was to construct a single windlass which might hold different chain cables, whatever their size; and that such a windlass was therefore not protected by the patent. *Hastings v. Brown*, 450.

II. Conditions.

Repeal of patent, for breach of condition subsequent, 310. *Charter*, 1. 1.

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II. Party suing in form *pauperis*. *App.* xxii. 121. 122. lxxxiii. 28.

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1. Not necessary as to rent due before the period described in the declaration, 416. *Time*, 1. 1.
2. Rules as to. *App.* lxxxi. 13. 14.

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II. Justice of. *Justice of the Peace*.

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Penal clause not extended by inserting words.

A clerk to the justices of a borough, who is employed in the prosecution of a person committed by such justices, is not liable to the penalty of 100*l.* under stat. 5 & 6 *W.* 4. c. 76. s. 102. *Coe v. Lawrance*, 516.

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- I. Effect of part performance as to rendering completion obligatory, 858. *Company*, VI. 2.
- II. General averment of, 99. *Contract*, I.

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4. To action against surety, change in the nature of the duties for which it was given, 295. *Surety*, II. 1.

5. That the contract declared on is in restraint of trade, 391. *Trade*, I. 1.

6. Justification pleaded to information for libel. 558. *Defamation*, I. 2.

7. To return to mandamus, 829. *Copyhold*, II.

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1. Waiver of plea. *App.* iii. 8.

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2. Pleading several pleas on same ground. *App.* lxxix. 2. 3.

3. Pleas in denial in actions on contract. *App.* lxxix. 6. 7. 10. 11.

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5. What must be specially pleaded. *App.* lxxx. 8. 12. 17.

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I. Property rateable.

1. Floating pier as accessory to land.

By stat. 10 G. 4. c. cxxix. Trustees were empowered, "for the better lighting and watching the several roads, streets, squares, lanes, alleys, courts, yards, and other public passages and places" under their jurisdiction within a district (part of *Lambeth parish in Surrey*), to cause the roads, &c. to be lighted and watched as they should think fit. And, "to defray the expenses of watching, lighting, and otherwise improving the roads, streets, lanes, courts, alleys, and other public passages and places," "and for removing and preventing nuisances, annoyances, and encroachments therein and incidental thereto, and for other the purposes of this Act," the Trustees were authorized to make a rate upon all persons "who

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do or shall inhabit, hold, use, occupy, possess, or enjoy any messuage or tenement, land, shop, warehouse, or other building, wharf, yard, storehouse, ground, cellar, hereditaments, or premises within any part" of the said district "under the jurisdiction of the said Trustees," according to the annual value.

The appellants, an unincorporated Joint stock company, were proprietors of steam boats plying on the *Thames*: and, for embarking and disembarking passengers, constructed a pier or landing place in the *Thames*, opposite to premises abutting on the *Thames*, which they held by lease of *S.*, and which consisted of the ground floor and cellar, being part of premises called *The Mill*, of which last mentioned premises the remainder was occupied by *S.* himself. The pier or landing place consisted of barges, moored by anchors in the bed of the river, and connected by wooden bridges with each other, and with a platform resting on an abutment which was bolted into the wall of the premises held of *S.* by the appellants. Passengers using the pier passed through the appellants' part of the premises, which were used also for a pay office, and contained other rooms, a warehouse for ropes, &c., and the cellar.

The Trustees rated the appellants by the words, "tenement, land, landing place and premises, and the brow or brows, barge or barges, dummy or dummies, lying upon, fixed to or connected with the same tenement, land, landing place or premises, and the easement or easements, anchorage or anchorages, held, used or enjoyed therewith." In the same rate *S.* was rated for a "Mill and premises" "exclusive of the steam boat pier." On appeal to the Sessions (which had jurisdiction by the Act) the rate was confirmed; and a case was stated for this Court, reserving the question as follows. "If, upon the facts stated, the Court should be of opinion that no rate can be maintained, the judgment of the Court of Quarter Sessions to be reversed. If the Court should be of opinion that the rate can be main-

tained, irrespective of its amount, the judgment of the Court of Quarter Sessions to be affirmed."

Held: That the rate was good, being substantially made on the land occupied by the appellants, and the other items mentioned being merely accessories, shewing the mode and purpose of such occupation, and adding to its value.

That *S.* was not rated for the land so occupied by the appellants. *Regina v. Leith*, 121.

2. Tolls, how considered as enhancing the value of land.

By stat. 10 *G. 4. c. xcvi.* a company was authorized to maintain a ferry by boats between *N.* and *S.*, the towns on opposite sides of the *Tyne* (which is there a navigable tide river), to erect ferry houses and offices on each side of the river for the habitation and use of the ferrymen managing the ferry, and the convenience of persons using it, to make and repair causeways at the landing places, and to make roads from the ferry on each side of the river, and purchase lands necessary for the purposes of the act; and to receive tolls for the passing to and over the ferry.

The Company constructed landing places in two townships, on opposite sides of the river, with a toll house and gate on each; their boats passed from one to the other, across the river, the bed of which was not in either township: the tolls were collected entirely on the south side. No tolls could have been earned for the transit on the river without the use of the landing places, nor for such use without the transit.

The Company were rated to the poor of the township on the north side, as occupiers of a "ferry, landing and tolls," in a sum including half the net value of the tolls.

Held: That the tolls could not be rated, either directly as being connected with real property occupied in the township and as thus ceasing to be incorporeal, or indirectly by taking them into account as profit of the lands.

But that the land should be rated on an estimate of the rent which might be obtainable for it in consideration of its being available for the purpose of earning the tolls. Also

That the rateable value of the land in question could not be ascertained by dividing the profits in the proportion of the land occupied in the two townships and the length of the transit. *Regina v. North and South Shields Ferry Company*, 140.

3. Floating dock, when not accessory.

M. occupied a ship building yard on the bank of a tidal navigable river; on the river itself was a ship dock belonging to *M.*, which floated at high water, and grounded at low water upon a part of the bed of the river. Owners of land on the bank, who used the adjacent bed of the river, paid an acknowledgment to the Conservators. *M.* used the floating dock for the repair of ships; and his workmen passed to it by a plank which rested on it and on the land of the yard, and was fastened by a staple to the dock. The dock was moored to the bed of the river by chains, and was also attached by chains to the yard. The chains were capable of being slackened, to enable the dock to be taken into deeper water, which continually occurred; and sometimes the harbour master removed the dock altogether.

M. was rated to the poor for his "river frontage, with floating dock attached," at an amount which was the aggregate of the separate value of the yard and the dock. The Sessions, on appeal, held that the floating dock was not rateable, but that the value of the yard was enhanced by it to the amount assessed; and they confirmed the rate.

This Court reduced the rate to the separate value of the yard, holding that the floating dock could not be considered accessory to the yard. *Regina v. Morrison*, 150.

4. Market tolls, what rateable and what not rateable.

Appellants were rated to the relief

of the poor on "the Market House, with the grounds belonging thereto, used and occupied for the tolls of the markets and fairs." It was admitted that under this description they were in fact rated not only for the Market House, but also for the tolls on merchandize sold in the market, and for payments made to the lord and his lessees for goods not sold but exposed for sale on stalls and otherwise; which payments, from time immemorial, were charged according to the situation of the stalls and other circumstances, according to the discretion of the lord and his lessees; and also for payments made for leave to use temporary theatres and shows. None of the stalls &c. were in any way affixed to the soil. The lord was owner of the soil of the market. The tolls were from time immemorial received in the Market House. The appellants were lessees for a term of years under the lord. On a case stating the above facts: Held, that the tolls on goods sold were not the subject of a rate, and that the fact that such tolls were paid in the Market House made no difference: but that the other payments were in the nature of compensation for the use of the soil, and that they and the Market House were properly rated. *Roberts v. Aylesbury Overseers*, 423.

5. Receipts in one parish, landing places &c. in two, 140. *Ante*, 2.

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lowed the mother's settlement. Per Lord Campbell C. J., *Coleridge and Wightman Js.*; dubitante *Crompton J.* *Bodenham Overseers v. St. Andrew's Overseers*, 465.

IV. Settlement by renting a tenement.

1. Secondary evidence of contents of written agreement.

On the trial of an appeal, the Quarter Sessions decided that there was not sufficient proof of search for a written agreement by *P.* to let a tenement, to make secondary evidence of its contents admissible, and rejected the evidence, subject to a case: by which it appeared that the document was traced to the custody of *P.*, and that a witness deposed that he asked *P.* if there was such an agreement; and *P.* answered, "I cannot say for a certainty;" and that *P.* then sent his clerk and witness to *P.*'s office to search, which they did; and the document was not found. *P.* was not called as a witness.

Held: 1. that the decision on a point of this kind might be reviewed; but that the onus was on the party objecting to the decision: 2. that it was not necessary to call *P.* if there was proof of the search having been made in the proper place of deposit; but that it did not appear that the Court below was wrong in deciding that it was not proved that the office was the proper place of deposit. *Regina v. Saffron Hill*, 93.

2. On what day the year is completed.

A building was let at 30*l.* per annum to *C.*, by a written agreement, stating that *C.* had taken it "from the 30th day of September 1850;" "the tenancy is for one year, commencing on the 30th day of September, instant" (1850). *C.* entered at noon on 30th September, 1850, and quitted at 4 in the afternoon of 29th September 1851.

Held, that *C.* gained a settlement by renting and occupying a tenement "for the term of one whole year at least," within stat. 1 W. 4. c. 18. s. 1. *Regina v. St Mary, Warwick*, 816.

V. Removability: five years' residence.
What absence of head of family is not merely temporary.

F. was resident in the parish of *S.* with his wife and family, in a house rented by himself. He was then hired; and the terms of his hiring required him to dwell in the parish of *C.* He went to *C.* and slept there every night whilst his hiring continued, which was for four years and four months; but he left his wife and family residing in the house in *S.*, for which he continued to pay the rent. He was then discharged from his hiring, and returned to his house in *S.*, where he continued to reside till removed to a third parish by an order made within five years of his return to *S.* His wife and family had never quitted the house in *S.* On appeal against the order, the Sessions decided that he had resided in *S.* for five years next preceding the order, but subject to a case, in which the above facts were stated: and the Sessions found that, whilst he dwelt at *C.*, he intended to return to *S.* whenever he should leave his situation, but did not wish to leave it, and did not do so willingly.

Held: That the question, whether on those facts *F.* resided in *S.* whilst dwelling at *C.*, was not concluded by the finding of the Sessions; and that his absence at *C.*, under a hiring which made it his duty not to return to *S.*, though he intended ultimately to return to *S.*, was not a mere temporary absence consistent with residence in *S.*, but a permanent residence in *C.*: and, consequently, that stat. 9 & 10 *Vict.* c. 66. s. 1. did not prevent his removal from *S.* *Regina v. Stapleton*, 766.

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VII. Appeal; right of appeal.

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Under stat. 4 & 5 *W.* 4. c. 76. s. 79. and 11 & 12 *Vict.* c. 31. s. 9., the ses-

sions have no jurisdiction to hear an appeal against an order of removal, where notice of chargeability has not been served on the parish to which the removal is ordered.

Before stat. 4 & 5 *W.* 4. c. 76., there was no right of appeal (except in the case of suspended orders) till actual removal. *Regina v. Recorder of Shrewsbury*, 711.

VIII. Appeal: finality of decision.

1. On appeal against order for maintenance of lunatic pauper.

On appeal against an order of maintenance of a lunatic pauper, under stat. 8 & 9 *Vict.* c. 126. s. 62., upon an adjudication of settlement under sect. 58.: a prior order of sessions adjudicating on the settlement, upon an appeal, between the same parties, against an ordinary order of removal, is conclusive as to the settlement at the time of such prior order: there being no difference, as to this rule of evidence, between orders of maintenance of lunatics on adjudication of the settlement and ordinary orders of removal. *Heston v. St. Bride's*, 583.

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Covenant by the Mayor, &c. of the borough of *B.*, on a deed, executed after stat. 5 & 6 *Wm.* 4. c. 76. and before stat. 6 & 7 *Vict.* c. 89., by which, after reciting that the council of the borough had elected *D.* treasurer of the borough, defendant became surety to the Corporation for *D.*'s accounting to them "during the whole time of *D.* continuing in the said office, in consequence of the said election, or under any annual or other future election of the said council to the said office."

Averments that, by subsequent elections, *D.* was continued in his office, and did not account. Breaches: non-payment by defendant.

Plea 6. That *D.* was elected to the office, and the deed given, whilst the office was annual under stat. 5 & 6 *Wm.* 4. c. 76., that, on the 9th November 1843, *D.* was, in obedience to stat. 6 & 7 *Vict.* c. 89. s. 6., elected to the office during pleasure: and that he accounted up to the 9th November 1843. On demurrer, Held: that the functions and duties of the office not being changed, it continued the same office, and the change in its tenure did not discharge defendant.

Plea 7. That, before breach, plaintiffs accepted a fresh surety bond in discharge of the deed sued on. On demurrer, Held bad, as pleading accord and satisfaction to a deed before breach. *Mayor of Berwick v. Oswald*, 295.

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A declaration in covenant recited that plaintiff and defendant had been partners as publishers of books, and that part of their trade, called the Canvassing Trade, consisted in publishing books in numbers, and employing travellers to sell such books by canvassing for purchasers. By indenture, dissolving the partnership, it was agreed that plaintiff should retain the whole of the partnership stock, and should indemnify defendant against all liabilities, and pay him a large sum of money. Defendant (inter alia) covenanted not directly nor indirectly to be concerned in the Canvassing Trade in *London* or within 160 miles of the General Post Office, nor in *Dublin* or *Edinburgh* or within fifty miles of either, nor in any town in *Great Britain* or *Ireland* in which plaintiff or his successors might at the time have an establishment, or might have had one within the six months preceding. Breaches: that defendant was engaged in the trade within 160 miles of the General Post Office, and also in *Manchester* and *Liverpool*, in which towns plaintiff, at the time of the breaches, had establishments. Pleas, to both sets of breaches: that there were numerous works which plaintiff did not publish, and had no intention of publishing, and that many such might be published with advantage to the public, by defendant, and without injury to plaintiff; that the Canvassing Trade applied to all such books; and that the restraint, as to the Canvassing Trade as applicable to such works, was unreasonable: verification. Demurrer (amongst other grounds), because the plea referred matter of law to the jury.

Held: That the declaration was good, it not appearing that the restraint was unreasonable. Held, also, that the pleas were bad in substance, as the facts disclosed did not shew that the restraint was unreasonable. *Quære* whether, if the facts had so shewn, the pleas would have been bad in form. *Tallis v. Tallis*, 391.

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In such action, it is sufficient for *Z.* to declare that, by reason of his possession of the land, he is entitled to have the use and benefit of the water flowing in a certain direction along the channel, and that defendant diverted the water therefrom. It is not necessary to refer to the grant. *Northam v. Hurley*, 665.

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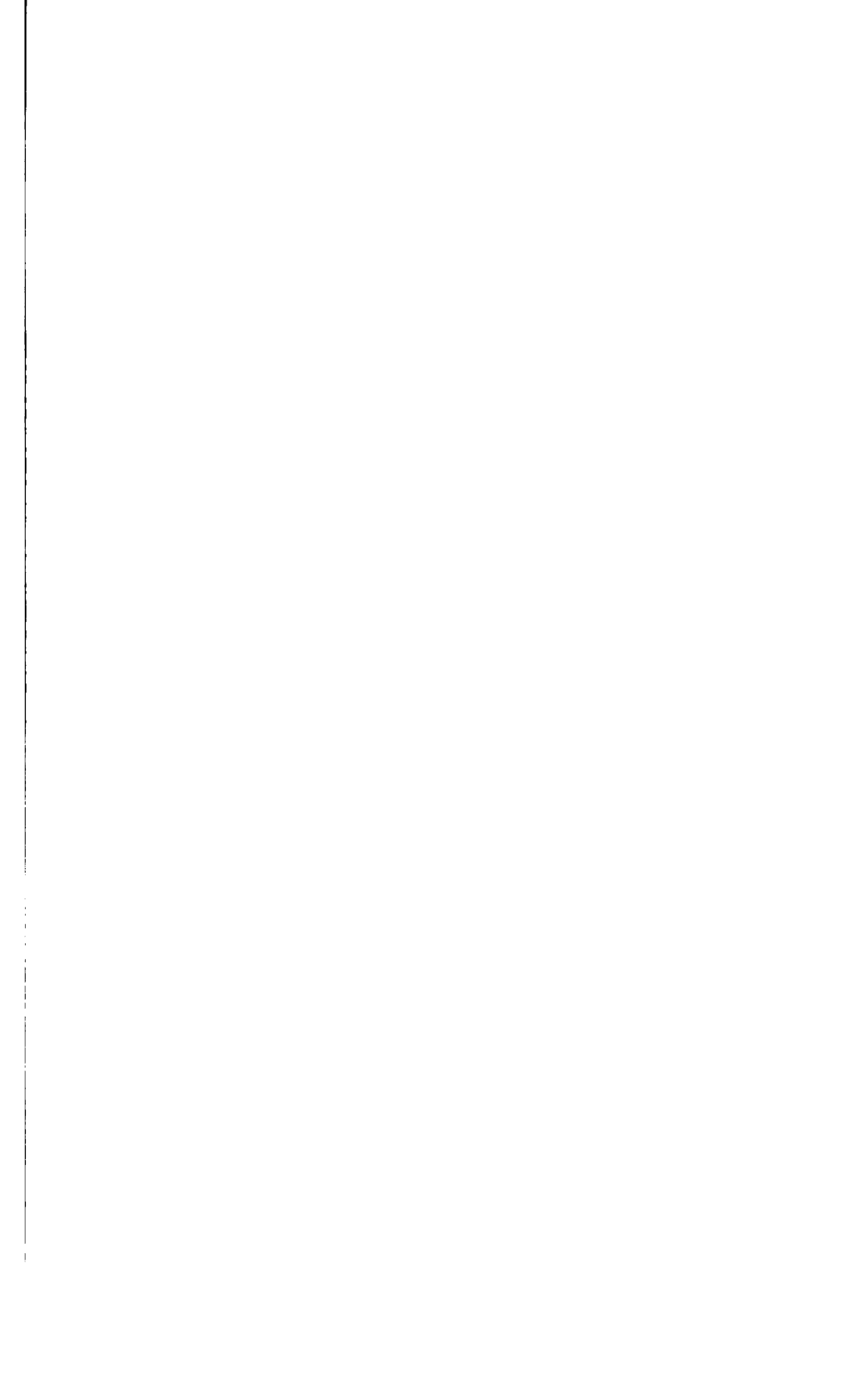
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